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IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 1974

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. MILLER, AND C. T. BUTLER,

Plaintiffs,

vs.

HEBER LADNER, J. E. HOSKINS, J. A. WHITE, GEORGE L. SHELDON, AND MRS. PAUL GAMMILL,

Defendants

STATEMENT AS TO JURISDICTION

The Defendants, Appellants on the Petition for Appeal, having presented this day their petition for appeal, now file this, their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

Plaintiffs are Perry W. Howard of Washington, D. C., in his capacity as Republican National Committeeman; Edna E. Redmond, of Jackson, Mississippi, in her capacity as Republican National Committeewoman; S. W. Miller, of Jackson, Mississippi, in his capacity as Chairman of the Republican State Executive Committee; and C. T. Butler, of Meridian, Mississippi in his capacity as Secretary of the

State Executive Committee; all of the Republican Party in Mississippi; and all in person. Defendants are Heber Ladner, Secretary of State of the State of Mississippi, who is named defendant in his official capacity; J. A. White, of Durant, Mississippi, in his capacity as Secretary of the State Committee; George L. Sheldon, of Clinton, Mississippi, as National Committeeman; Nelson E. Taylor, of Greenwood, Mississippi, as Chairman of the State Committee; and Mrs. John Hancock, of Indianola, Mississippi, as National Committeewoman; all of the Mississippi Republican Party, and all individually, as the real parties in interest. While this appeal relates to the basic rights, powers and sovereignty of the government of the State of Mississippi, on the advice of the Attorney General, the Secretary of State does not join in this appeal.

I. FEDERAL STATUTES CONFERRING JURISDICTION

Jurisdiction of this appeal direct from the District Court to the Supreme Court of the United States is conferred by Judicial Code Section 1253 (28 U. S. C. 1253). The complaint invoked jurisdiction only under Judicial Code Section 1331 (28 U. S. C. 1331). It alleged that the Defendant, Heber Ladner, Secretary of State of the State of Mississippi, acting under color of a law of said State (and a construction thereof by the Supreme Court of Mississippi) had deprived and would deprive Plaintiffs of their property without due process of law unless enjoined; that the other Defendants were enjoying and claiming, and would continue to enjoy and claim, the rights and benefits alleged to accrue to Plaintiffs unless enjoined; and prayed for appropriate injunctions, declarations and mandates to have the statute under which Defendant, Heber Ladner, had acted and proposed to act, declared unconstitutional, and to compel him

to do and perform such acts as would secure to the Plaintiffs the rights which they claimed. The "federal question" or "arising under" jurisdiction invoked by Plaintiffs was that Chapter 458 of Mississippi Laws of 1950 violated the Fourteenth Amendment to the Constitution of the United States in that it deprived the Plaintiffs of their property without due process of law; and alternatively, that if the law was not unconstitutional, it had been improperly and erroneously interpreted and applied by Defendant, Heber Ladner, (and the Supreme Court of Mississippi) with the effect that Plaintiffs had been deprived of property without due process by state action. The complaint prayed the convening of a Three-Judge District Court pursuant to Judicial Code Section 2284.

Counterclaims were served by Defendants as compulsory counterclaims under Rule 13(a), F. R. C. P., the determination of which was (or would have been) incidental to the claim of the Plaintiffs. In addition to the incidental jurisdiction under Rule 13(a), the counterclaims alleged independent grounds of jurisdiction. They charged customs and usages having the effect of law, under which State action had resulted in discrimination against Defendants because of their race and color (because Defendants were white Republicans and not colored Republicans); and that the privileges and immunities of the Defendants as citizens of the United States, and their right to equal protection of the laws; as well as their rights to vote have been abridged, denied and abrogated, contrary to the terms of the Fourteenth, Fifteenth and First Amendments to the Constitution of the United States, and contrary to the provisions of Section One of the Civil Rights Act of 1871 and of the Civil Rights Act of 1861 as Amended by Section Two of the Civil Rights Act of 1871 (8 U. S. C. 43 and 47); whereby jurisdiction was vested in the United States District Court by Judicial Code Sections 1343 and 1344.

The cause of action alleged in the counterclaims was that the State of Mississippi, in order to perpetuate the Democrat control of its State election machinery, had enabled the Plaintiffs in this action, and persons acting in concert with them, to maintain a rival Republican organization to that of the Defendants, although the Plaintiffs did not comply with State laws controlling party organizations; the State having denied any remedies to Defendant (*Howard* v. *Sheldon*, 151 Miss. 284, 117 So. 839 and *Johnson* v. *Howard*, 167 Miss. 475, 141 So. 573) and had enabled the Plaintiffs to maintain their organization open to participation in its affairs only by persons specially chosen and desirous of aiding the Democrats in the perpetuation of their control of state policy under a one-party system.

The Three-Judge Court was convened pursuant to the prayer of the complaint, and all proceedings had herein have been before the Three-Judge Court. As organized and constituted, the District Court granted the demands of the Plaintiffs, ordered a mandatory injunction against the Defendant, Heber Ladner, requiring state action by him prohibited by the statute involved, and which the Supreme Court of Mississippi had held he was prohibited from performing, dismissed the counterclaims of the other Defendants without hearing thereon, and taxed all costs against the latter.

II. DATE OF JUDGMENT AND TIME OF APPEAL

This appeal was perfected within the time allowed by Judicial Code Section 2101(b). On October 16, 1953 the District Court filed its opinion, the concluding paragraph of which appeared to order the relief demanded. On motion for clarification and for other matters, an "Order" was entered on October 26, 1953, (1) denying the motions of the

Defendants for summary judgment, (2) sustaining Plaintiffs' motions to strike the counterclaims of the Defendants, (3) awarding to the Plaintiffs a mandatory injunction against the Defendant, Heber Ladner, as Secretary of State of the State of Mississippi, requiring him to act and perform as prayed in the complaint, and (4) awarding the Plaintiffs the recovery of all costs against the Defendants other than the said Heber Ladner (Appellants). The order thus entered purports to adjudicate finally all issues joined, and is a final judgment. The order clarifying the date of the judgment was entered on October 28, and provides for the stay of the mandatory injunction pending this appeal.

The petition for appeal, assignment of errors, and this jurisdictional statement are filed simultaneously on the 24th day of November, 1953, and are presented on said date.

III. OPINIONS INVOLVED IN APPEAL

The opinion of the District Court has not been published, but has been spread on the record of said Court, and will appear in the transcript of record at pages to ; and for convenience, a copy of said opinion is presented herewith.

Since the court below appears to have undertaken to review, revise and correct the decision of the Supreme Court of Mississippi in the case of *Hoskins* v. *Howard*, No. 38478 on the docket of the Supreme Court of Mississippi, and adopts the opinion of that court except as revised and reversed, copies of the opinions rendered by said Supreme Court are included herewith, along with the opinion of the District Court. The State Supreme Court opinion is reported in 214 Miss. 481 and 59 So. 2d 263, and see also No. 420 on the docket of the Supreme Court of the United States, October, 1952 term, 344 U. S. 915, 73 S. Ct. 334, L. ed. , wherein certiorari was denied.

IV. PRELIMINARY STATEMENT

The judgment of the United States District Court entered herein on October 26, 1953 nullifies and abrogates that part of Chapter 458 of the Mississippi Laws of 1950 providing for the registration of political parties wherein, after providing the manner of, and conferring the authority for, the registration of parties, the law provides that:

> "Thereafter, no political party shall use or register any name or part thereof which has already been registered with the Secretary of State by any other political party."

It is questionable whether the District Court read into the statute an ambiguity by virtue of the sentence thereof immediately preceding the one quoted above; or if it held that this provision denied to Plaintiffs their property without due process of law. The entire first section of Chapter 458, Laws of 1950 (Mississippi Code of 1942, Section 3107-01, 1952 Cumulative Supplement, page 46) reads as follows:

> "The chairman or secretary of the state executive committee of each political party chosen as provided in section 3107, code of 1942, as amended by chapter 308, Mississippi laws of 1948, shall register the name of the political party it represents with the secretary of state within thirty (30) days after the effective date of this act. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the secretary of state by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary of state.
>
> "Any political party hereafter organized under the laws of this state shall register with the secretary of state in the manner as herein provided and within thirty (30) days after such organization."

V. CONTENTIONS OF DEFENDANTS IN TRIAL COURT

However the trial court may have reached its conclusions, Defendants (Appellants) contended that:

1. There had been a previous construction of the statute by the Supreme Court of Mississippi contrary to that placed thereon by the District Court; and that this previous construction was binding upon the Plaintiffs (Appellees) and the Court;

2. The previous construction by the Supreme Court of Mississippi was correct;

3. Neither the statute nor the judgment and construction of the Supreme Court of Mississippi, nor the acts of the Defendant, Heber Ladner, Secretary of State, performed thereunder, denied any property, rights, privileges or immunities to the Plaintiffs contrary to the Constitution of the United States;

4. The judgment of the Supreme Court of Mississippi was res judicata of the issues tendered by the Plaintiffs, and was binding upon them and the District Court;

5. The construction of the statute by the Supreme Court of Mississippi was binding upon the United States District Court under the Rules of Decision Act;

6. The action by the Plaintiffs against these Defendants was not one arising under the Constitution, laws or treaties of the United States, and no jurisdiction thereof was conferred by Judicial Code Section 1331; and that since Plaintiffs declined to invoke, and disavowed altogether, jurisdiction in the District Court under Civil Rights legislation or on any other grounds, the Court had no power to entertain the claims of the Plaintiffs;

7. Plaintiffs waived their right to appeal from the State Supreme Court, even though they obtained their transcript of record for that purpose well within the time allowed for

appeals, by not presenting their petition therefor within the time allowed by law; and that Plaintiffs were estopped by their petition to the Supreme Court of the United States, under the affirmative averments of the finality of the judgment of the Supreme Court of Mississippi on the federal questions presented in this action;

8. Plaintiffs had not organized their political party in accordance with Chapter 308 of the Mississippi Laws of 1948, as required by Chapter 458 of the Mississippi Laws of 1950, as a condition precedent to the relief demanded in their action; and that this appeared affirmatively from the uncontradicted evidence;

9. There was no basis for holding that the Defendants had changed the name of their political party, as held by the Circuit Court of Hinds County, Mississippi, which holding was adopted by the District Court in this case, even though the Supreme Court of Mississippi had reversed the judgment of the Circuit Court after holding such change to be immaterial; the allegation of change of name being denied by Defendants, and Plaintiffs having introduced no evidence thereon;

10. The Three-Judge Court had no jurisdiction to sit as a court of review, errors or appeals to pass upon, superintend and revise the decisions of the Supreme Court of Mississippi, as it undertook to do in this case;

11. The Secretary of State was held by the Supreme Court of Mississippi to act in a judicial capacity in granting or denying the application of a political party for registration under Chapter 458 of the Mississippi Laws of 1950; and the District Court could not order the Secretary of State to register Plaintiffs' party pursuant to said act without hearing thereon; neither the Secretary of State nor the Supreme Court having reached the question of whether Plaintiffs were a political party within the meaning of the

law, and the holding of the Circuit Court thereasto having been integrated into its judgment, which was reversed; and that for the District Court to so order was a denial of due process of law contrary to the Constitution of the United States;

12. That the District Court could not ignore the opinion, mandate and other portions of the record of the proceedings in the Supreme Court of Mississippi, and predicate its finding that the Supreme Court did not pass upon the validity of the statute in question on the ground that the judgment actually entered on the minutes of the Court did not mention constitutionality vel non; when the laws of the State of Mississippi made the mandate and the opinion a part of the record with equal dignity and effect with the judgment, and in fact, the operative part of the record; and that these procedural laws which determine the course and effect of the decisions of the Supreme Court of Mississippi are entitled to full faith and credit in the Federal Courts.

VI. SHORT STATEMENT OF CASE

Plaintiffs claim to have succession as the Republican Party in Mississippi since 1872, which is denied by the Defendants; the defensive averment being that Plaintiffs' organization is the outgrowth of a minority group which detached itself from the Republican Party in Mississippi in 1924 and, with the aid of Mississippi Democrats, obtained recognition by the Republican National Convention of that year. Plaintiffs allege that Defendants organized as the Independent Republican Party in the year 1928, which allegations are denied by Defendants; the affirmative averments being that the people reorganized the Republican Party in Mississippi in 1928, and that the organization to which Defendants adhere has functioned as such with the approval of a majority of the Republican voters and has

never changed its name; but that State officials, the press and some members of the public, from time to time, have called the organization the "Independent Republican Party" among other names; and that in their 1948 convention, a resolution was adopted to reaffirm the previous use of the name "Mississippi Republican Party," and to repudiate the unauthorized and unwarranted use of the words "Independent" and "Lily Whites," thereby renewing and making a record of the correct name. No evidence was introduced on either of these issues, but the District Court, by adoption of the findings of the Circuit Court, found the facts to be as alleged by the Plaintiffs.

Further defensive averments were to the effect that Plaintiffs purposely limited the size of their organization in order that its convention delegation vote in the National Convention could be controlled, and would be controlled, by a faction of the Republican National Committee; and also in keeping with the policy of guaranteeing to the Democrats in Mississippi that no rival Republican organization would threaten the one-party system in Mississippi. Repeated efforts by the Defendants' political party to require Plaintiffs' organization to comply with the election laws in Mississippi failed. Although the Legislature of Mississippi responded to the call of the Democrat party when that party's independence and cohesion were threatened in the years 1944 and 1948, the Legislature steadfastly refused to exercise the power and comply with the mandate of Section 247 of the Mississippi Constitution to "enact laws to secure fairness in party primary elections, conventions and other methods of naming party candidates," to the end that an effective Republican Party would receive equal protection, or fair treatment and justice under law. After months of committee hearings, debates and legislative de-

liberation, Chapter 458 of the Mississippi Laws of 1950 was enacted and signed into law on April 7.

It is conceded on every hand that Chapter 458 was passed for the special purposes of the Mississippi Democrat party, then wholly out of harmony with the Democrat National Convention of 1948 and the National Committee elected by it. The Secretaries of both the Democrat and the Republican State Executive Committees filed their applications with the Secretary of State for the registration of their respective parties on the date on which the act was signed and lodged with the Secretary of State. While registration was granted to the Democrats on the day on which the act was signed by the Governor and the application filed, negotiations and proceedings with the Secretary of State for the registration of the Mississippi Republican Party continued from the filing date (April 7, 1950) until April 11, 1950; on which date the Secretary of State endorsed on the application that it was accepted for the registration of the Mississippi Republican Party.

In the course of the proceedings on the application, the Secretary of State obtained a ruling from the Attorney General, who held that the application, as amended in several particulars during the proceedings, was in proper form.

Under the current Mississippi Code of 1942, in addition to the general duties of a usual nature for the office imposed by Section 4191, and the related duties specifically provided by the other sections of Title 17, Chapter 13, of the Code; in Mississippi, along with the Governor and the Attorney General, the Secretary of State is a member of the State Election Commission under Section 3204, which also provides that the Commission shall appoint the election commissioners in each county in the State, to consist of three discreet persons who shall not be of the same

political party, if such men of different political parties can be had (Sec. 3205). Under Section 3263, he makes up the official ballot in all state elections, to be furnished to the designated commissioners of each county. The election commissioners of each county are required to certify the returns of each election to the Secretary of State for filing as a permanent record, by Code Section 3280; and by Section 3281 it is made the duty of the Secretary of State to verify and total the votes cast for the various candidates for each office, to ascertain the person or persons receiving the highest number of votes, and to declare them to be the persons duly elected; these acts of the Secretary of State being conditions precedent to the issuance of commissions for the offices being filled. He performs like duties under Sections 3299 as to electors for the selection of a President and Vice President of the United States; and as to Supreme Court Judges under Section 3315. Thus it is that the Secretary of State is the custodian of the records which disclose the action of the people of the State of Mississippi in all matters in which they are called upon to exercise their sovereign power through the ballot.

Of even more significance here is the function of the Secretary of State in receiving, recording and preserving the primary election returns and party nominations under Sec. 3146. While there is no affirmative provision requiring it, he acts upon the evidence thus lodged with him when he prepares the ballot for the general elections as required of him by Section 3263, cited *supra*. By the nature of his office and its functions, he is the best qualified and most appropriate official to make the primary finding or adjudication in matters of elections and registrations. He may administer oaths, Sec. 4196; is the official auditor of all claims in favor of the State Auditor, Sec. 3864; receives and certifies all financial reports required to be filed by

county officers, Sec. 4267; conducts the final proceedings for the organization *vel non* of soil conservation districts, and either grants or denies the certificate evidencing such organizations as governmental subdivisions, Section 4944; conducts the initial and final proceedings for the grant or denial of corporate charters, Sec. 5310; grants and suspends permits for the operation of investment companies within the State, and approves or disapproves the bonds tendered by them, and, subject to judicial review, supervises and regulates the dealing in investment securities under Title 21, Chapter 4 of the Code; and, by Sec. 133 of the Constitution, the Secretary of State is required to perform such other duties as may be required of him by law, many of which involve the primary judicial function as defined and recognized in Mississippi jurisprudence.

The Mississippi Republican Party having obtained registration pursuant to Chapter 458 of the Mississippi Laws of 1950 on April 11; the Plaintiffs, acting in person and through their attorneys, made application for the registration of their organization as the Republican Party in Mississippi on April 29, 1950. This application was referred to the Attorney General for his advice, which was to the effect that, a party already having been registered under the name "Republican," no other registration under that or a similar name was permitted by the Act.

The opinion of the Attorney General on the last-mentioned application recites that the purpose of the Act is to provide for the identification of the party affiliation of the candidates, without duplication as to the name of parties, in order that voters be not misled; and cites the constitutional authority (Section 247) for the enactment of the law, and for its approval and validity. Although he was not called upon to pass upon the point, the Attorney General expressed the view that the petition presented by the Plain-

tiffs herein showed that their party conventions in preceding years had been held in accordance with Chapter 308, Laws of 1948 (Sec. 3107 of the Code) and that Plaintiffs' application would entitle them to registration, if it were not for the fact that another party making a similar showing already had been registered.

Pursuant to a suggestion in the latter opinion of the Attorney General, that the alternative rights of the Plaintiffs and the Defendants to have their parties registered was litigable in the Circuit Court of Hinds County, Mississippi, in August, 1950, Plaintiffs instituted an action at law for mandamus in that forum, wherein Defendants here, or their counterparts under the previously-existing organization, were joined with the Secretary of State as respondents.

On demurrers to the declaration in the mandamus proceeding, the Court adopted the view of the Plaintiffs, as evidenced by their inclusion in the declaration of the record of the proceedings of both Democrats and Republicans, that the proceeding before the Secretary of State was judicial in nature; and while holding that the declaration stated a good cause of action, ruled that no relief could be granted for the reason that the Court could not control judicial action by mandamus. It thereupon permitted the amendment of the declaration to convert the proceedings into one for certiorari; and proceeded to hear evidence to supplement the record; and, notwithstanding the failure of proof that Plaintiff had complied with Chapter 308, Laws of 1948 (Code Sec. 3107), rendered judgment cancelling the registration of the Mississippi Republican Party on the application of the Defendants, and ordering the registration of the Republican Party in Mississippi on the application of the Plaintiffs. Note that the Secretary of State is not shown to have ruled upon the question of the regularity of Plaintiffs' organization pursuant to Chapter 308 of the Laws of 1948, which is made a condition precedent to registration pur-

suant to Chapter 458 of the Laws of 1950; and that, while an effort was made in the Circuit Court to prove irregularity of this organization, the proof offered by the Plaintiffs failed to meet the requirements of the Act. Cancellation of the registration of the Mississippi Republican Party was predicated upon the alleged and supposed change of name by the resolution adopted by the Mississippi Republican Party at its 1948 convention in an effort to curtail its designation as the "Independents" and "Lily Whites."

On appeal to the Supreme Court of Mississippi (*Hoskins* v. *Howard*, 214 Miss. 481, 59 So. 2d 263), the Supreme Court of Mississippi adopted the view previously expressed by the Attorney General of the State of Mississippi, and implicit in the holding of the Circuit Court of Hinds County, to the effect that two parties could not be registered under Chapter 458 of the Laws of 1950, both using the name "Republican." Holding that the change of name relied upon by the Plaintiffs and the Circuit Court was no obstacle to the registration of the Mississippi Republican Party, it reversed the judgment of the Circuit Court and ordered the reinstatement of the registration on the application of the Defendants.

In so holding, the State Supreme Court, after pointing out the uncontroverted priority of registration, and the immateriality of the alleged change in name, used the following language:

> "The Secretary of State under this act has 'the power to hear evidence and decide facts. He proceeds upon inquiry and determines facts and in our judgment is an inferior tribunal having quasi-judicial powers.' Power v. Robertson, 130 Miss. 188, 223, 93 So. 769, 772. The records brought up under certiorari fully support his action in registering the party represented by appellants as the Mississippi Republican Party."

Whether on proof or presumption, the quoted language must be interpreted as a finding by the Supreme Court of Mississippi that the Secretary of State had properly adjudicated compliance by the Mississippi Republican Party, represented here by Defendants, with the requirements of Chapter 308 of the Mississippi Laws of 1948 as a condition precedent to registration, as provided in Chapter 458 of the Laws of 1950.

The primary basis for the challenge in the State Court to the registration by the Plaintiffs and the denial of registration to the Defendants, by the Secretary of State under Chapter 458, Laws of 1950, was the alleged unconstitutionality of the Act, both under the Constitution of the State of Mississippi and under the Constitution of the United States. That the same challenge was made in the Supreme Court of Mississippi is evidenced by the following language taken from the opinion quoted *supra:*

> "Appellees challenge the constitutionality of the 1950 act on numerous grounds. It is contended that it denies Appellee the right to peaceably assemble and petition the Government as guaranteed by Section 11 of the Mississippi Constitution, that it denies the right of freedom of speech and of the press as guaranteed by Section 13 of the Mississippi Constitution, that it deprives Appellees of their liberty and property without due process of law contrary to Section 14 of the Mississippi Constitution, that it violates Section 32 of the Mississippi Constitution in that it destroys the liberty of Appellees to organize and associate themselves with others for political purposes and denies them the right to freely exercise their franchise, and that for the stated reasons it violates similar provisions of the Constitution of the United States."

On the citation and discussion of numerous authorities, the Supreme Court upheld the constitutionality of the act. After holding that the priority and time provision of the

act was a just and reasonable rule of decision in such matters as had been determined by the Secretary of State, and could be prescribed by the Legislature under Section 247 of the Constitution, the State Supreme Court summed up in the following language:

> "Under the aforesaid 1950 act the Appellants were the first to register their organization with the Secretary of State, and the appellees did not file their application for registration until nearly three weeks later. We are of the opinion that the Mississippi Republican Party was properly and legally registered and that the appelles were not entitled to registration of their organization under the party name which used the word 'Republican'.
>
> "For the views herein expressed the judgment of the lower court will be reversed and the judgment will be here entered reinstating the registration of the Mississippi Republican Party and cancelling the registration of Republican Party of Mississippi, as ordered by the lower court."

After the reversal of the judgment of the Circuit Court, Plaintiffs made an attack upon the organization of the Court rendering the opinion; and also filed their suggestion of error, analogous to a petition for rehearing, which was overruled. Thereupon, Plaintiffs obtained a certified transcript of the record in the Supreme Court of Mississippi for filing with their petition to the Supreme Court of the United States for the grant of a writ of certiorari. Although the certified transcript was completed in ample time for the perfection of an appeal to the Supreme Court of the United States, neither it nor the petition for certiorari was filed until after the expiration of the time allowed for such petitions, and the Supreme Court denied the petition for certiorari as not having been filed in time, No. 420, October Term, 1952. Reference is here made to the petition last mentioned for representations by Plaintiffs that

the judgment and decision of the State Supreme Court adjudicated their claim of right to registration, both under Section 458, Mississippi Laws of 1950, and under the Constitution of the United States, and that the parties were concluded thereby.

On May 20, 1953, Plaintiffs filed their complaint herein, which, after amendment, named parties and invoked jurisdiction as above stated. Other pertinent allegations of the complaint are summarized as follows:

> 7. The Republican Party in Mississippi, of which plaintiffs are officers, and for whose members the action is alleged to be brought, as a class, has had continuous succession enjoying and exercising semi-corporate powers under the laws of the State of Mississippi, and has been recognized by the Republican National Convention as its sole representative in that state, whereby plaintiffs and the class represented by them acquired a proprietary right and title in and to the name "The Republican Party in Mississippi"; that the name "possesses great and immeasurable value and prestige in both state and national affairs," and because of the long and continued use thereof, "particularly the word 'Republican' ", political power, prestige and patronage has descended to and vested in plaintiffs and have become property rights of which plaintiffs may not be divested by state action, and that the facts further alleged thereinafter, were such a state action in violation of the Fourteenth Amendment.
>
> Defendants, and the class they represent, organized themselves as "The Republican Party in Mississippi" in 1927; thereafter, as "The Republican Party Council" and finally as "The Independent Republican Party" in 1928; under all of which defendants undertook to appropriate the vested prestige, patronage and political power which had become the exclusive property of plaintiffs; until the year 1948, when they undertook to change their name to "The Mississippi Republican Party", all for the purpose of appropriating to

themselves, and the class, the enumerated property rights of plaintiffs, without first having been recognized and accepted by the National Convention of the Republican Party.

9. On April 7, 1950, plaintiffs were officers in their "Republican Party in Mississippi", on which date, at 9:00 A.M., Chapter 458, Mississippi Laws of 1950 went into effect, section 1 whereof is quoted in full.

10. At 1:55 P.M. on April 7, 1950, there was filed with Defendant Ladner, Secretary of State, by Defendant White, on behalf of the other Defendants, an application for the registration of the Mississippi Republican Party, which was approved and accepted on April 11, 1950. On April 29, plaintiffs applied for registration of their party, which was denied on May 13, on the assigned reason that another party had been registered as Republican.

11. The holding that only one party of the same name could register within thirty days, and not any party by any name, was an erroneous interpretation of the act, deprived plaintiffs of their property in the name "Republican" in violation of Section 1 of the Fourteenth Amendment; was a deliberate perversion of the Act, and a denial of due process.

12. Defendants claim and assert the rights belonging to plaintiffs, and will exercise and enjoy them unless restrained, plaintiffs having no other adequate remedy.

The prayer of the complaint is that a three-judge court convene; for process; for a declaration that Chapter 458, Mississippi Laws of 1950, is unconstitutional; for a mandatory injunction requiring the registration of Plaintiffs' party, with certificates thereof to Plaintiffs individually; an injunction against the named Republican Defendants against "the sole and exclusive use of the name "Republican" and claiming exclusive rights; for costs; and for general relief.

The answers of Defendants (Appellants) set up defenses of failure to state a claim; lack of jurisdictional amount under Judicial Code Section 1331; affirmative denial of jurisdiction under Civil Rights Act; lack of equity jurisdiction disclosed on the complaint; admissions and denials with affirmative allegations to limit the same; res judicata under the judgment of Supreme Court of Mississippi; and judicial estoppel on the Petition for Certiorari to the Supreme Court of the United States.

Defendants other than the Secretary of State served, with their answers, counterclaims as outlined in the two last paragraphs but one of Article I of this Jurisdictional Statement. The Secretary of State, represented by the Attorney General, served his answer setting up the single defense of res judicata. Thereupon a motion for summary judgment was served by the Attorney General, and the other Defendants joined therein. Plaintiffs moved to strike the counterclaims and portions of the answers, to which Defendants (Appellants) served a response.

At the trial, it was announced that the hearing would be limited to the complaint and answers; and that consideration of the counterclaims would be pretermitted until after the determination of the issues made on the complaint.

The exhibits to the motions for summary judgment were accepted as evidence for all purposes, and the only other evidence was the testimony of Plaintiff, Howard, as to the cost of organizing a party under another name; tendered as evidence of value involved for jurisdictional purposes. The documentary evidence was a transcript of the proceedings in the former litigation. On review of the record thus made, the District Court ordered the re-registration of plaintiffs' party, without disturbing the registration of Defendants' party, but adopting the holdings of the state trial court in all other respects.

VII. QUESTIONS PRESENTED—AND REASONS WHY THEY SHOULD BE CONSIDERED SUBSTANTIAL

1. Is a political right, such as the privilege of participating in political party affairs, of that character which may be classed as property, within the protection of the Due Process Clause of the Fourteenth Amendment?

Note that the rights asserted by Plaintiffs, while associated with the right to vote, are not claimed as incidents thereto; but rather they are asserted as special benefits or a franchise exercised by them under previously existing law, but as the agency or representative of the Republican National Committee, so that the combination resulted in "property" and "value" if the combination remains intact, whereas no property might exist if the elements thereof be considered a mere aggregation.

A variation of Plaintiffs' contentions in this respect (and the holding of the District Court), as evidenced by the citation and reliance upon the case of *Dartmouth College* v. *Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629; may be that the agency or representation by the Republican Party in Mississippi of the Republican National Committee, from 1872, or 1924, until 1950, with no authority exercised over Republican affairs in the State except such as might flow from the National Committee, the functions and privileges had developed a commercial and monetary value analogous to a franchise, existing prior to Chapter 458, Mississippi Laws of 1950, or to Section 247 of the Constitution of 1890; so that Amendment Fourteen, and its relation to the first eight amendments, and by the same talisman, to the Obligation of Contracts Clause of the Constitution of the United States, prevents the State (by Constitution Sec. 247) or its Legislature (by Chapter 478, Laws of 1950) from regulating, abrogating or nullifying the

"franchise" (cf. "If the legislature mean to claim such authority, it must be reserved in the grant." 4 Wheat. 712); Plaintiffs claiming their rights in the aggregate as a semi-corporation, a voluntary association, and as an agency or instrumentality of the Republican National Committee.

True, Plaintiffs did base their argument in part on *Ashby* v. *White*, 2 Ld. Raym. 938 (cited in *Dartmouth College*, 4 Wheat. 675), where redress of a deprivation of the right to vote was allowed in an action on the case under the doctrine of Lord Holt that the elective franchise, originating as an incident to the ownership of land, might be protected as property, from either direct or consequential injury, and damages would be presumed from the trespass or other tort. But by asserting that Plaintiffs claim collectively in the right of their organization, the property and ownership vested by long use in the association under its name, and the assertion of the value thereof to members only as a criterion for jurisdictional amount, must be accepted as a rejection of any claim of invasion of the right to vote, since it was not suggested that the organization, the officers thereof, or even the National Committee, as distinct from the individuals themselves, ever had, claimed, or appropriated to themselves the privilege of voting in Mississippi elections. Of course, the claimed right is that the association of which Plaintiffs are members and officers, be allowed to function in Mississippi as a political party, the laws of that State and judgments of its courts to the contrary notwithstanding.

The District Court based its finding of value and property upon the collective, as distinguished from individual, "social and political" rights, saying, "Even clubs and associations may acquire property rights in the use of a name."

Euphemistically (cf. Patronage Cases, *United States* v. *Hood*, 343 U. S. 148, 72 S. Ct. 568, 96 L. Ed. 846, and Num-

bers 51 to 55, inclusive (decided November 16, 1953) it may be said that Plaintiffs claim (and the District Court sustains) a measurable monetary value in the privilege of setting up in business to carry out commercial transactions under the trade name of "Republican Party in Mississippi —Affiliated with the Republican National Committee" and that the "value" of the "commerce" thus made possible will be destroyed unless Plaintiffs are permitted to register their name under the Party Registration Act, and thereby be enabled to go through the forms of functioning as a political party. The many implications that may arise from this need not be followed here.

Plaintiffs assert value in privileges they exercised and enjoyed by reason of their recognition by the Republican National Conventions and the National Committees set up by them. They assert that their organization had its birth under the sponsorship of the National Committee. This is not unlike Dartmouth College, except that the National Committee, unlike King George, did not have sovereign power. It is contended that the National Committee is not bound by Mississippi law, and may not be required to accept representation in that State, either by legislative or judicial action. This is conceded by Defendants. But the National Committee claims no property in the State, and although it may seem that Plaintiffs endeavor to create the impression or raise the inference, this action was not brought in the name nor for the benefit of the National Committee.

Defendants find no jurisprudence sustaining the claim of property rights in political privileges vested in a group or class or in an association with "semi-corporate" powers and privileges. If Plaintiffs asserted their claims as an incident to the right to vote, their contentions would be met by *Pope* v. *Williams*, 193 U. S. 621, 632, 24 S. Ct. 573, 48 L. Ed. 817, 822. If analogy to the right to vote is to be con-

sidered, Plaintiffs are met by a long line of State authorities, of which the following is typical:

> "It [the right to vote] in no sense can be said to be an asset of commercial value. It is a privilege bestowed by law, which, although of paramount importance, is not such a privilege as can be measured by, or paid for, in dollars and cents, or speculated upon for pecuniary gain. It is a political privilege, as distinguished from a property or personal right." *Morris* v. *Colorado M. R. Co.*, 48 Col. 174, 109 Pac. 430.

The District Court cites for authority, the case of *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111. In order for that authority to be applicable, the rights here involved must be considered assignable (as well as inheritable) and to have been transferred to the "semi-corporate" voluntary association as an entity, and also that damage to the individual members of the class represents a corresponding, if not equivalent, loss to the association.

Other questions which arise under the view that Plaintiffs' claims are to property or property rights, are not listed for separate discussion, but a few may be mentioned here. Under the "value in commerce" hypothesis put forward above, the value assumed to exist would be to the individuals and not to their aggregation. Such value would consist in the actual return, or enhancement, in the amount or worth of the commerce assumed to exist. Such commerce would be that of the members and not the aggregation or the aggregate. Cf. *Kvos* v. *Associated Press*, 299 U. S. 269, 57 S. Ct. 197, 81 L. Ed. 183.

The only evidence introduced to meet the issue of amount involved under Judicial Code Section 1331, was testimony as to the cost of organizing another political party in Mississippi. Obviously, if the Republican Party in Mississippi is to be abandoned, it does not bear the monetary expense of forming a new one. The question presented is not such

cost or damage to the plaintiffs individually, but the worth of the presently existing party, or, considering the individual advantages to the members, the value to them in the aggregate. Where the amount in controversy for jurisdictional purpose is dependent upon property rights, as distinguished from money itself, the subject matter or claim must be of such a nature as to be measurable or at least estimable by some recognized pecuniary standard. The action here is for injunctive and declaratory relief, and the rule just stated was applied or announced in *First Nat. Bank* v. *Hughes,* 106 U. S. 527, 1 S. Ct. 489, 27 L. Ed. 268; *Durham* v. *Seymour,* 161 U. S. 235, 16 S. Ct. 452, 40 L. Ed. 682; *Scott* v. *Donald,* 165 U. S. 107, 17 S. Ct. 262, 49 L. Ed. 648, and see *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423.

The District Court states "It has long been settled that for jurisdictional purposes the value of social and political rights is capable of pecuniary calculation," citing *Giles* v. *Harris,* 189 U. S. 485, 23 S. Ct. 639, 47 L. Ed. 909. While the case cited was a suit for an injunction based on denial of registration as a prerequisite to voting, the matter was mentioned in passing, jurisdiction being considered in that case as arising under civil rights under the Fifteenth Amendment. Mr. Justice Holmes mentions the objection raised because of failure to allege that the value of the matter in dispute did not exceed $2,000, and states that "the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in Money," citing *Wiley* v. *Sinkler,* 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84, and *Swafford* v. *Templeton,* 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005. In both cases cited, the actions were for damages, and the demands for judgment exceeded the jurisdictional amount. It is pertinent to note that the injunction was denied in *Giles* v. *Harris,* not for want of a question arising under, or in-

adequacy of amount involved, but because the question was of a political nature and, therefore, not a proper subject for equity determination. In other words, Mr. Justice Holmes held that there was no equity in the bill, on much the same grounds as set out in the Fifth Defenses of each of the Defendants (Appellants) on this record.

In citing *Giles* v. *Harris*, the District Court loses sight of the principle that the primary allegation of the amount in controversy in the jurisdictional clause in a complaint, is only in order that issue may be joined; and that when so joined, and material, the allegation must be supported by what follows (the facts alleged must show how the value may be involved), and factual issues may be framed and tried, solely on the jurisdictional question.

2. May jurisdiction of a civil action to enjoin enforcement of a state statute requiring the registration of political parties as a condition to the privilege of functioning as such, and which makes previous organization according to state law, and an affirmative finding thereof by an appropriate officer of the state, a condition precedent to registration, be predicated upon the "arising under" provisions of Judicial Code Section 1331, or under the "Civil Rights" jurisdiction under Section 1343, because the statute prohibits the registering authority from registering a party with the same or a similar name to one already registered?

The problem here is, what is the Federal question? The District Court went beyond the allegations in the complaint, and even the contentions of the Plaintiffs, to invest itself with jurisdiction under the civil rights legislation. That no such jurisdiction was invoked or involved was the subject of the Fourth Defenses of these Defendants. Plaintiffs moved to strike this portion of the answer, on the theory that it was not responsive to anything in the complaint,

and offered no proof on the theory of civil rights. The Court cited *Wiley* v. *Sinkler*, 179 U. S. 58, 21 S. Ct. 17, 45 L. Ed. 84; *United States* v. *Classic*, 313 U. S. 299, 61 S. Ct. 331, 85 L. Ed. 1368; *Smith* v. *Allwright*, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987; *Terry* v. *Adams*, 345 U. S. 461, and *McGrael* v. *Phelps*, 144 Wis. 1, 128 N. W. 1041, 35 L. R. A. (N. S.) 353. Nothing here involves the right to vote in the election of Congressmen, or in any other election. There is no claim of discrimination, and these Defendants, by their pleadings, challenged Plaintiffs to show any. In fact, Plaintiffs sought a contest, both on the complaint and in their counterclaims, to show who had been the victims of discrimination and unequal protection by State action, and how favored Plaintiffs had been at the hands of a Democrat government preserving the solidarity of the one-party system. If civil rights are involved in every case in which a plaintiff alleges a disadvantage resulting from State law and that he is unable to obtain relief in the courts of that State; then every case in which a litigant loses in the State Court potentially is a civil rights case, and there is no area of exclusion for "arising under" jurisdiction, and Section 1331 is mere surplusage.

As to "arising under" jurisdiction, the only federal law or provision relied upon is the Fourteenth Amendment, and that only to the extent of the allegation that the rights asserted are "valuable vested property." What is or is not property may be, in the ultimate, a federal question under the Due Process Clause, but in every instance other than a grant or franchise direct from the United States, the attributes of property must be spelled out of State law. Even in grants or rights derived from the central government, where power to regulate or control has not been reserved, either by express provision or by implication, State law determines "that congeries of rights, powers and privileges which we call property." This is the basis

upon which the Supreme Court of the United States, and United States Courts in general, accept decisions of State Courts, without regard to merits, under the doctrine of "the rule of property," cf. *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458, 45 S. Ct. 543, 69 L. Ed. 1050.

The absence on this record of any "arising under" federal question is clear except as the question may be clouded by the misapplication of the language used in *Bell* v. *Hood*, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939. Reliance on this authority overlooks the language contained in the opinion which says:

> "The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Obviously, Plaintiffs do not claim specific tangible property such as might be protected in actions of ejectment or replevin. They do not claim damages for trespass or other tort. Their demand is for protection by injunction of certain rights which they denominate property. But when the complaint is examined further, the rights asserted are such as arise from a grant by the State upon conditions that may be imposed, altered or withdrawn by State law. To denominate such claims of right, title, interest and possession as property is to vest every citizen in the United States with a potential claim that the existing order may not be changed. Political rights are derived from State law, and continue only in accordance therewith. *Pope* v. *Williams*, 193 U. S. 621, 24 S. Ct. 573, 48 L. Ed. 817; *Mason* v. *Missouri*, 179 U. S. 328, 21 S. Ct. 125, 45 L. Ed. 214; *United States* v.

Cruikshank, 92 U. S. 542, 23 L. Ed. 588; *Breedlove* v. *Suttles*, 302 U. S. 277, 58 S. Ct. 205, 82 L. Ed. 257; *People ex rel. Murray* v. *Holmes*, 341 Ill. 23, 173 N. E. 145; *Dorsey* v. *Brigham*, 177 Ill. 250, 52 N. E. 303; *Gougar* v. *Timberlake*, 148 Ind. 38, 46 N. E. 339; *Kinneen* v. *Wells*, 144 Mass. 497, 11 N. E. 916; *State ex rel. Engelhard* v. *Weber*, 96 Minn. 422, 105 N. W. 490.

Let it be noted that cases like *United States* v. *Classic*, *Smith* v. *Allwright and Terry* v. *Adams* all are under the civil rights jurisdiction of the United States Courts, and do not depend to any extent on the "arising under" jurisdiction conferred by Judicial Code Section 1331.

3. Where a State statute provides for registration of political parties with the Secretary of State, but as a condition precedent to registration, requires that the party shall have been organized in accordance with pre-existing law, and the Supreme Court of the State construes the act to mean that the Secretary of State acts in a judicial capacity in passing upon the legality of the organization of the applicant; may a United States District Court, after invalidating the statutory and judicial requirements of the statute and State Court judgments for registration without duplication of names, require the Secretary of State to register applicant party on application rejected by him, where there has been no adjudication of regularity of organization, no evidence thereof is introduced, and the only basis for so holding is an expresison of opinion by the Attorney General advising on another issue?

The question presented here is both substantive and procedural, and relates specifically to review in the courts of the United States of administrative procedures in the various States. Particularly, the courts of the United States must so adapt their approach to problems of administrative review as not to nullify valid substance under the name of procedure, or to confuse irrelevant procedure with a final adjudication of substantive rights.

It would serve no useful purpose here to review the constitutional history of Mississippi. We may "tear the seamless web" by noting that prior to the adoption of the Constitution of 1890, our jurisprudence demonstrated the necessity for review of discretionary power reposed in executive officers. Indeed, it has been necessary for the courts to stay the hand of the Legislature itself. See *State ex rel. McClurg* v. *Powell*, 77 Miss. 543, 27 So. 927.

Thus the Circuit Court of each county, being the court of residual jurisdiction, having all judicial power not vested in some other court, and having appellate jurisdiction subject to statutory control, as provided by Constitution Section 156; is invested with jurisdiction by Code Section 1428, "of all . . . actions and causes, matters and things arising under the Constitution and laws of this State which are not exclusively cognizable in some other Court. . . ."

The prior action in the State Court (see *Hoskins* v. *Howard, supra*) was entertained by the Circuit Court as a review on certiorari. That court found error of law in that the Secretary of State had applied the test of *"Prior Tempore, Potior Jure."* But the record did not disclose any evidence or finding by the Secretary of State that Plaintiffs had organized their party in compliance with Chapter 308, Mississippi Laws of 1948. Now it may seem strange that a court of law reviewing an inferior court under a writ of certiorari should proceed to hear evidence, both oral and documentary, wholly apart from the return of the writ. But in Mississippi, such is the scope of "actions and causes, matters and things." Of course, if the record had shown action by the Secretary of State in this behalf, the Court would have had before it only the question of the propriety of his act, a question of law. The absence of any finding by the Secretary of State that Plaintiffs' party was

lawfully organized was a condition which opened the record in the Circuit Court.

As to Defendants, the Secretary of State had granted their application, and they were registered. This could have been done only upon his finding that their organization was lawful under Chapter 308, unless the proceeding had been on a charge of abuse of discretion or arbitrary action without support of, or contrary to, competent evidence. The legality of Defendant's party was admitted by Plaintiffs, and adjudicated by the Circuit Court.

But as to Defendants, it was first proposed to introduce the record of the organization in Sharkey County as typical of all eighty-two counties in the State. After the records were in evidence, and Defendants were introducing proof that only one of the several individuals named as participating in the Sharkey County organization was a qualified voter in that county, these records were lost and could not be found. Thereupon, at the close of the trial, the records of Jefferson Davis County were introduced. Defendants were allowed to procure proof as to this organization, and the same irregularities appeared as before. Nevertheless, without specific finding on the point, the Court ordered that the registration of Defendants' party be stricken, and that Plaintiffs' party be registered. This overriding of the plain requirements of the law was assigned as error on the appeal to the Supreme Court.

When the Supreme Court took the case, it found no error on the part of the Secretary of State, who followed the advice of the Attorney General, in refusing to register two parties of the same name, and in accepting the registration of the first qualified party to apply. Under its holding, it did not reach the error assigned on the insufficiency of evidence that Plaintiffs had complied with Chapter 308, Laws of 1948. As noted above, the Circuit Court made no finding thereon, and its holding is inferred from its order for registration of

Plaintiffs' party. But this order was reversed by the Supreme Court of Mississippi.

In order to sustain its holding, the United States District Court points to the following in the opinion given by the Attorney General to the Secretary of State:

> "I think the petition filed herewith shows that the party conventions of the applicant were held in accordance with these laws and, but for the fact that a prior registration of another party making similar showings had already been registered, petitioners would be entitled to registration; but under House Bill 912, two political parties cannot be registered under the same name, each claiming to be a political party whose name was registered or sought to be registered."

It is not suggested that the Attorney General was the officer to make the determination. The Circuit Court evidently was not impressed with this, since it opened the record for the hearing of evidence. That evidence did not carry the issue for Plaintiffs, but the Circuit Court held in their favor anyway. The Supreme Court reversed on another matter, so that the issue was not material.

The judgment of the Circuit Court having been reversed, nothing in it or in the record supporting it was binding, except as it was adopted or relied upon in the judgment entered on the minutes of the Supreme Court.

The sum of what has happened is that the United States District Court has used a passing comment of the Attorney General, not charged with any duty under the act except to advise the Secretary of State, when requested, to set aside an act of the Secretary of State performed as required by the act, and as affirmed by the Supreme Court, while saying that in so doing it follows the Circuit Court, which made no specific finding, and whose judgment was reversed. The Court undertakes, on review of the record, to overrule the Su-

preme Court on the authority of the Attorney General, and orders acts prohibited by the law its purports to uphold.

4. Was the judgment of the Supreme Court of the State of Mississippi res judicata of the issue before the United States District Court?

There are many variations of this question. First in importance is, must the rule in *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832, be confined to diversity cases. Must Angel, like *Erie R. Co.* v. *Tompkins*, be supplemented by another opinion (*Ruhlin* v. *New York L. Ins. Co.*) in order for the broad sweep of res judicata to be effective?

The United States District Court took the view that constitutionality did not play any part in the decision of the Supreme Court of Mississippi, since it was not mentioned in the judgment, reasoning that the discussion of the question in the opinion was collateral to its construction of the statute. How this could be is not apparent, but both steps in the proposed logic are unrealistic. What the judgment ordered was that Plaintiffs' party be no longer registered, and that registration of Defendant's party be restored. That was the opposite of what Plaintiffs sought. It will not do to say that this is a different case because Plaintiffs omit their demand that Defendants' party name be stricken, ~~and that Plaintiffs be restored~~. The issue of registration vel non of Plaintiffs is the same in both cases. No citation is needed for the proposition that a new and different claim is not stated merely because half of the old is omitted.

While the judgment of the Supreme Court of Mississippi does not mention constitutionality, it is the operative record upon which rights are determined. Whether the Secretary of State registers one party or the other, or both or neither; under the present system of courts and practice therein, the rights of citizens of Mississippi are to be determined by its judgment.

Certiorari and appeal have moved the record from the office of the Secretary of State to the office of the Clerk of the Supreme Court of Mississippi. Either appeal or certiorari might have brought that record to the Supreme Court of the United States, for alteration or correction, and when finished, the mandate would have returned it to the Supreme Court of the State. But not so with the mandate of the State Supreme Court. In practice, our mandates do not return or remand the matter after reversal unless specifically ordered, and such orders are made only for further proceedings in accordance with the opinion of the Court. On remand, the officers of the court from which the appeal was had are bound to execute the Supreme Court judgment instead of the judgment reversed, Code Section 1990. When any further proceedings are required, a copy of the opinion accompanies the mandate for the guidance of the officers and the court, Code Sec. 1991. Thus the operative part of the process for remand is the opinion, and not the judgment. In fact, while the judgment serves a definite function in the Supreme Court, elsewhere the opinion is the operative part of the record.

5. May a State take measures to prevent the duplication of party names on its ballots, and is the requirement that the registering officer, after having ascertained the legality of organization and accorded registration to one party, not thereafter register another under the same name or a similar name, an appropriate exercise of the power to regulate parties?

From *United States* v. *Classic* to *Terry* v. *Adams*, the Supreme Court has held that political parties are the creatures of the States. This has been on the theory that the States ruled supreme, providing the law under which parties functioned, and accepting the benefits of party action. It

has been implied that if there was wrong, the State was guilty, if for no other reason than because of nonfeasance in the matter of control and restraint.

In 1948, Mississippi had the experience of having two sets of Democrat candidates. It may be assumed that much thought was given to the problem during the next year, and that House Bill 912, as originally introduced (which, after amendments, became Chapter 458, Laws of 1950) was the result of this thought and study. That the Legislature had the power to provide a solution to the problem, under Constitution Section 247 was not doubted. Able and respectable counsel held that the Legislature could, by enactment, set up self-perpetuating central organizations to function under the appropriate party names, leaving open to dissidents the opportunity of forming new parties under other and non-conflicting names.

Being political, and the Legislature traditionally being the political branch of government, it was urged with reason that it could rule supreme. Nevertheless, on the basis of the more rigorous proposals, it will appear that the Legislature acted with extreme restraint. No change was made in pre-existing law touching the matter of party organization of conventions (Chapter 308, Laws of 1948). Compliance with that law was made a condition precedent to registration. Registration was required of existing parties, if they were to claim continuity, and duplication of names was forbidden. New parties or old parties who might not be able to preserve their names, or show legality in their previous organization, were permitted registration under appropriate procedures.

The laws of other States furnished guides for the Legislature. Exclusive names, emblems or devices are provided for in many States other than Mississippi. To the extent that the laws of other States were relied upon in the draft of

House Bill 912, and the various amendments adopted before enactment as Chapter 478, Laws of 1950; the decision here under review brings into question the legality of the laws of those States. Jurisprudence from such States will be the principal guide to the Supreme Court on the decision of the questions presented on this appeal.

Thus the matter of whether or not the judgment of the District Court should be allowed to stand should not be passed without consideration of its effect as a precedent in those states which have used the exclusive name or device. The following cases, among many others, are deserving of the attention of the court:

Stewart v. *Ballot Commission*, 71 W. V. 346, 76 S. E. 448.
Brown v. *Jenson*, 86 Minn. 138, 90 N. W. 153.
State v. *Houser*, 122 Wis. 534, 100 N. W. 964.
Craig v. *Brown*, 144 Cal. 480, 46 Pac. 870, Cited in 82 Pac. 775.
In re Social Democrat Party, 93 N. Y. S. 1023.
Navens v. *Cohen*, 262 N. Y. 444, 187 N. E. 633.
In re Green, 41 N. Y. S. 179.
State v. *Johnson*, 10 Mont. 556, 46 Pac. 440.
State v. *Arm*, 24 Mont. 447, 63 Pac. 401.
Phelps v. *Piper*, 48 Neb. 724.

And see particularly *O'Brien* v. *O'Brien*, 213 Minn. 140, 6 N. W. 2d 47.

The fact is that time is involved in all election procedure. The three dimensions of the ballot system are number, time and identity. Only the last need be rigid in an effective system. Mississippi was late in realizing, or in taking action on, the necessity for rigid identification of candidates and parties. To take action, it relied heavily upon the other two factors as to which common knowledge and the availability of judicial review would provide adequate safeguards.

One Democrat and one Republican party had to be deprived of its name. Which should it be? It has been said, "I have no assurance that a London landlord will receive more adequate protection from the House of Lords than from the Ministry of Health." Actually, there was no need for such haste as was exhibited by the Democrats. It was well-known that the rival organization had not organized according to law. A contest on this issue could have had but one solution. Their haste served only to obviate controversy.

As to the Republicans, the test of time alone demonstrated what other test may have failed to emphasize. One party was actively operating to strengthen its organization in order the better to serve and augment its constituency. The other had disbanded under its program of co-operation with the Democrats, not expecting to be active again until another election year, and depending upon the Democrats to preserve a favorable environment for their continued operation. These, as well as the election returns, and many other relevant factors, were before the Supreme Court of Mississippi in *Hoskins* v. *Howard*, as matters of common knowledge. The Legislature, the executive arm of the State, and the State Supreme Court have found nothing arbitrary, unjust or of questionable validity in the result.

6. Where a complaint shows on its face that the intervention of the United States Court is sought in a political matter, does it show equity because under the state system of division of powers, the exercise of discretion by executive officers is reviewable by State courts without regard to the legislative nature of function to be performed.

This, and other questions mentioned hereinafter, will not be discussed in the light of authorities. The question here arises out of what may be a system of division of Legislative, Executive and Judicial powers known only in Mis-

sissippi. Before the advent of Administrative Law as a separate field of jurisprudence, Mississippi had worked out its own solutions, so that commonly accepted classifications of powers would not hold in that State. The matter here involved is legislative in character. If Federal power is to be exerted, it should come from Congress, and not from the courts. There is a large body of jurisprudence to the effect that equity will not intervene in a purely political dispute. *Giles* v. *Harris*, 189 U. S. 475, 47 L. Ed. 909; *Howard* v. *Sheldon*, 151 Miss. 284, 117 So. 839.

This was the subject of the Fifth Defenses in this civil action. Are Defendants to be the victims of a rigorous application of this rule (*Howard* v. *Sheldon, supra*), only to have it abrogated for their extermination?

7. To what extent may controversies be brought before a three-judge United States District Court as compulsory counterclaims under Rule 13(a) F.R.C.P.; either under incidental jurisdiction or independent grounds of jurisdiction; and to what extent would Defendants so situated be precluded?

8. On trials before a three-judge Federal Court, is there any duty upon Defendants to make an offer to prove defensive matter, where Plaintiffs have offered no evidence to support the affirmative averments of the complaint?

9. To what extent is a Three-Judge United States District Court, convened to pass upon a charge of denial of due process of law by State officers, or by State action, bound by the Rules of Decisions Act, the doctrine of the Rule of Property, and by the law of the case, where the matter has been in litigation in the courts of the State and State litigation has been concluded?

VIII. CONCLUSION

Since this litigation was begun in the Circuit Court of Hinds County, Defendants (Appellants) have had constantly before them the specter of a judgment, such as the one here under consideration, being entered against them; followed by a quick repeal of the challenged law, whereupon Plaintiffs would move to dismiss the appeal of Defendants as moot. As stated above, Chapter 458, Mississippi Laws of 1950, was passed for the special benefit of Mississippi Democrats. It is true, as Plaintiffs allege, that delivery of the engrossed act to the Secretary of State was followed so closely by the registration of the State Democrat Party that the two may be considered simultaneous or one integrated event. Although the bill had been in legislative process for months, had been advertised, advocated and criticized in the press, had been the focal point in the most serious threat to the party of Jefferson and Jefferson Davis since the latter debated bond repudiation with Seargent S. Prentiss earlier than a hundred years before its passage; Defendants, on hand to claim its benefits, had difficulty in obtaining a copy of the law, were furnished a copy of the bill before final amendment, and were not able to present their application until four hours and fifty-five minutes after the Democrats had registered. Even then, having only an imperfect copy of the Act, their application required amendment, and was not approved until it had been referred to the then Attorney General, now an Associate Justice of the Supreme Court, and an opinion was rendered by an assistant, a former Associate Justice. Plaintiffs, asserting their claims of absentee ownership, did not appear until more than three weeks after the Act became law.

Simultaneous with the trial of this case in the Circuit Court of Hinds County, Mississippi, the absentee "ownership" of the rival Democrat Party suffered the misap-

propriation of its "vested property rights" under its asserted rule of the National Committee, as must be expected when principle is subordinated to expediency; and the problems of the registered Democrats found a different solution. See *United States* v. *Hood*, 343 U. S. 148, 72 S. Ct. 568, 96 L. Ed. 846 and Numbers 51, 52, 53, 54 and 55, Summary Docket, United States Supreme Court, decided November 16, 1953.

The atmosphere in which a Mississippi Republican Party, bent on functioning as such, must operate, is best portrayed by the report of *United States* v. *Sullens*, 36 F. 2d 230. When the action was filed in the State Court, it was thought by some to have been for the benefit of the "Dixiecrats" as well as the Plaintiffs, as might be indicated by the form of the Declaration, and the representation of these Appellees by a leading member of the Democrat State Committee. As will be seen, reasons other than the sanctity of State sovereignty may have impelled the Attorney General to call off his assistants and take no part in the appeal to the State Supreme Court, as the State is eloquent by its absence here on this appeal.

Since it is too much to hope that these words will be a deterrent to the legislative session biennially convening in January, 1954, the paramount questions confronting Appellants are to what extent a Federal Court may give permanent direction to the polity of a State, and have its action enthroned under the doctrine of mootness; and, specifically, can this judgment become moot while giving new life and permanence to the last of the "Black Tom" parties to survive enlightenment of Whites and Coloreds alike? With this judgment as its guide, how can this or future Legislatures act to remedy the evil which the Mississippi Supreme Court held had been remedied by this Act? And what of parallel problems that may arise in other states?

To what extent may enlightenment and experience be reflected in political progress in a constitutional republic?

The issue here does not lend itself to solution by any precedent. Should the legislative fiat be again enlisted in the cause of Democrat solidarity, the judgment of the court below does not evaporate, but remains as an historical fact, a notorious pre-emption of a part of the public domain in which Plaintiffs so boldly assert they have been vested with property rights superior to the seigniorage of the State, under the aegis of due process of law. When the State of the birth of the "States Rights" movement, disdains the challenge to its power to regulate those processes by which it obtains continuity; and proclaiming itself the defender and protector of the superior mores, abandons its power to regulate its more vital domestic affairs and the means of shaping its polity to the feeble defensive efforts of a minority group, which it has sought to brand as outcast and renegade; the judicial processes may not retreat behind the veil of fiction and assume the shackles of mootness. Sovereignty, like land, when abandoned, must pass to another. The less there is inherent in the constituent States, the less there is united.

Let it be noted to the eternal credit of the Secretary of State, the then Attorney General and his able Assistant, that, having participated in a move to appease the largest segment of the electorate ever to vote in accord; either they could not or would not stultify themselves; though not to do so gave birth to the most potent threat to their beloved party solidarity in more than a century. Though it may have been thought that the exigencies of the elective judiciary would save the day, so that repeal at the 1952 biennial session was unnecessary, the fortitude of the Justices of the Supreme Court of Mississippi in rejecting what everyone knew to be untrue as to legislative intent, and meting out

even-handed justice to these Appellants is a tribute to the judiciary as a class, wherever situated.

These prefatory words are interposed for the reason that, while being the paramount issue unless the Legislature shall stay its moving hand, the question of mootness, when it arises, can be determined, not in and of itself, but only as it relates to the other questions presented. Moreover, the potential question of mootness, riding upon so many issues in this case, serves to emphasize the gravity of the questions presented and to underline the reasons why they should be held to be substantial. Aside from the fact that only the stay now in effect in this case prevents the addition of another bastion to the fortification from which Plaintiffs and their cohorts have helped to thwart a people, and have frustrated the elective processes; the question of mootness is a fallow field in litigation involving constitutional limitations of political power, where one sovereign has invaded the province of another, even though the occupation be not permanent. There is a genuine need for the exposition of the principle of mootness as applied to Federal intervention in State affairs in aid of civil rights and personal liberties in cases of the character of this one.

WHEREFORE, Defendants (Appellants) respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal; and that the questions submitted for determination arise under the Constitution and Laws of the United States and are important and substantial.

J. A. WHITE,
NELSON E. TAYLOR,
LESTER E. WILLS,
Counsel for Appellants.

APPENDIX "A"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

Civil Action No. 1974

PERRY W. HOWARD, SR., EDNA E. REDMON, S. W. MILLER, and C. T. BUTLER, Plaintiffs,

vs.

HEBER LADNER, J. E. HOSKINS, J. A. WHITE, GEORGE L. SHELDON, and MRS. PAUL GAMMILL, Defendants

Before Rives, Circuit Judge, and Mize and Thomas, District Judges

RIVES, *Circuit Judge:*

The plaintiffs seek an injunction restraining the Secretary of State for the State of Mississippi from the enforcement and execution of a State statute, or a part thereof, upon the ground that, as construed and applied by the Supreme Court of Mississippi in Hoskins, et al. vs. Howard, et al., 214 Miss. 481, 59 So. 2d 263, said statute, or part thereof, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.[1] The statute in question is now known as Chapter 458, Mississippi Laws of 1950, or as Sections 3107-01 to 3107-09 inclusive of the Mississippi Code of 1942, as amended; and in pertinent part is copied in the footnote.[2]

The suit is brought by the plaintiffs as officers and members of the "Republican Party of Mississippi" on behalf

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[1] " • • • ; nor shall any State deprive any person of life, liberty, or property, without due process of law • • •."

[2] "Section 1. The chairman or secretary of the state executive committee of each political party chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948, shall register the name of the political party it represents with the secretary

of themselves and of all the members of said Party against the defendant, Ladner, as Secretary of State for the State of Mississippi and against the other defendants individually and as officers and representatives of the "Mississippi Republican Party". The complaint prays also for a judgment declaring said statute unconstitutional, at least in part, and for an injunction against the defendants other than the Secretary of State restraining them and others similarly situated from claiming to be the sole "Republican" political party in said State.

Jurisdiction of a federal district court is invoked on the ground that the matter in controversy exceeds the value of $3,000.00, and arises under the Constitution of the United States. 28 U. S. C. A. 1331.[3] Another ground suggested for federal jurisdiction is to redress the alleged deprivation under color of a State law or statute of a right, privilege or immunity secured by the Constitution of the United States. 28 U. S. C. A. 1343(3).[4] A three-judge district

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of state within thirty (30) days after the effective date of this act. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the secretary of state by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary of state.

"Any political party hereinafter organized under the laws of this state shall register with the secretary of state in the manner as hereinafter provided and within thirty (30) days after such organization."

[3] "*Federal question; amount in controversy*

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

[4] "Section 1343. *Civil rights.*

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

court to hear and determine the action is requested under 28 U. S. C. A. 2281.[5]

The complaint alleges that: "The amount in controversy, involving a property right to a political name and title, and the right to existence as such under the said name, exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs."

These allegations are admitted by the defendant Secretary of State, but are denied by the other defendants. While the rights involved are political and transcend mere property rights, they include the latter also. It has long been settled that for jurisdictional purposes the value of social and political rights is capable of pecuniary calculation. Giles vs. Harris, 189 U. S. 475, 485. Even clubs and associations may acquire property rights in the use of a name. 4 Am. Jur., Associations and Clubs, Sec. 37. In a true class action the test of jurisdiction in an injunction suit is the amount or value of the aggregate interests of the members of the class on whose behalf the suit is brought. Gibbs vs. Buck, 307 U. S. 66, 72; Annotation 30 A. L. R. 2d 663. Plaintiff's evidence, which was not contradicted, established that the cost of reorganizing their party or of supplying it with another name would greatly exceed the sum of $3,000.00.

Even then, the question would remain, "What's in a name?" With political party labels, certainly in the South, it does not hold true that a party by any other name would smell as sweet to thousands of voters. Attachment to political labels has become proverbial. We find that the matter in controversy exceeds the sum or value of $3,000.00 exclu-

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[5] "Sec. 2281. *Injunction against enforcement of State statute; three-judge court required.*

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

sive of interest and costs and that federal jurisdiction exists under 28 U. S. C. A. 1331.

The right to vote in elections of members of Congress is a privilege secured by the Constitution of the United States. Wiley vs. Sinkler, 179 U. S. 58; United States vs. Classic, 313 U. S. 299, 314. That privilege extends to the right to vote in party primary elections (United States vs. Classic, supra; Smith vs. Allwright, 321 U. S. 649; Terry vs. Adams, 345 U. S. 461), and hence to be free from unreasonable restrictions in acting under the party name. [L. A. McGrael vs. Frank Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L. R. A. (N. S.) 353.] The right to the equal protection of the laws is also secured by the Constitution of the United States. We think that federal jurisdiction exists under 28 U. S. C. A. 1343(3) irrespective of the amount involved. Clearly, a Three-judge District Court is required under the provisions of 28 U. S. C. A. 2281, et seq.

All parties defendant join in moving for summary judgment on the ground that the decision of the Supreme Court of Mississippi in Hoskins, et al., vs. Howard, et al., supra, is entitled to full faith and credit in this Court and is res judicata of all questions and matters raised by the plaintiffs in this case. They insist further that from that judgment the plaintiffs here (who were the appellees in the Mississippi Supreme Court) had a right of direct appeal to the Supreme Court of the United States under the provisions of 28 U. S. C. A. 1257(2),[6] but that instead they petitioned the Supreme Court of the United States for a writ of certiorari in said cause, which petition was denied on the 5th day of January, 1953, "for the reason that application was not made within the time provided by law. 28 U. S. C.

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[6] "Sec. 1257. *State courts; appeal; certiorari*

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Sec. 2101(c)." 344 U. S. 915. The defendants further insist that the plaintiffs are now estopped because in their untimely petition for certiorari they adopted a position inconsistent with their claims in the present litigation.

A restatement of some of the facts is essential to a clear understanding of this case:

The "Republican Party of Mississippi", of which the plaintiffs are the officers and state executives, was organized in 1872, and has been recognized and accepted by the National Convention of the Republican Party as its representative in the State of Mississippi. A schism developed and in 1928 the defendants (other than the Secretary of State) or their predecessors organized the "Independent Republican Party of Mississippi", which has since that time consistently polled a larger vote than the older party. The name of the "Independent Republican Party of Mississippi" was changed from and after the Presidential election of November 2, 1948 to "Mississippi Republican Party".

The Act in question became effective immediately upon its approval by the Governor of Mississippi, which occurred on the 7th day of April, 1950. On that same date the defendants other than the Secretary of State filed with the defendant Ladner as Secretary of State an application for the registration of the "Mississippi Republican Party" under the provisions of said Act. The application, as amended on April 10, 1950, was approved and the registration granted on April 11, 1950. Thereafter, on April 29, 1950, twenty-two days after the approval of the Act, plaintiffs applied for registration of the "Republican Party of Mississippi". The Secretary of State sought the advice of the Attorney General of Mississippi, and, acting upon the Attorney General's opinion,[7] declined to register said political party under the name of the "Republican Party of Mississippi".

[7] In part, "I think the petition filed herewith shows that the party conventions of the applicant were held in accordance with these laws and, but for the fact that a prior registration of another party making similar showings had already been registered, petitioners would be entitled to registration; but under House Bill 912, two political parties cannot be registered under the same name, each claiming to be a political party whose name was registered or sought to be registered."

Plaintiffs then brought suit in the Circuit Court of Hinds County, Mississippi, against defendants, who were the same as the defendants in the present action or their predecessors in office. The complaint filed in the State Court was in two counts, comprising some sixty-one record pages. The first count claimed that, by reason of the attempted change of name of the defendants' party in November, 1948, from the Independent Republican Party to Mississippi Republican Party, it was not entitled to registration under the latter name and sought a writ of mandamus to compel the Secretary of State to cancel the registration of defendants and to register plaintiffs as the Republican Party of Mississippi. The second count of plaintiffs' complaint in the State Court averred that, if the plaintiffs were mistaken in the relief demanded in the first count, then the Act as interpreted, applied and enforced was violative of the rights of the plaintiffs under the Constitution of the State of Mississippi and under the Constitution of the United States, referring among other provisions to the due process clause of the Fourteenth Amendment. The only prayer for relief in the second count was contained in its concluding paragraph as follows:

> "Wherefore, the plaintiffs say that if they are not entitled to the relief prayed for in the first count of this declaration, said act of the legislature is void and of no effect and the plaintiffs pray that the court will enter a judgment so declaring said act to be unconstitutional."[8]

Upon the trial, the State Circuit Judge expressed his opinion that the proper form of remedy was a petition in the nature of certiorari to the Secretary of State, and permitted the proceeding to be amended to incorporate such a petition. After a full hearing, the State Circuit Court ordered that the registration of the party represented by the defendants be cancelled and that the party represented by the plaintiffs be registered as the Republican Party of

[8] Mississippi does not provide for actions seeking declaratory judgments.

Mississippi. The Circuit Judge expressed fully the reasons for his ruling. A contrary construction or application of the statute would, he thought, render is unconstitutional.[9]

From that judgment the defendants appealed to the Supreme Court of Mississippi. That Court held that the lower court had erred in its holding that the change in name from Independent Republican Party of Mississippi to Mississippi Republican Party justified a rejection of defendants' application for registration. The Supreme Court of Mississippi further held that the statute authorized the Secretary of State to register the name of the first political party applying for registration, and that thereafter no other political party could register under the same name or any part thereof, and that the plaintiffs were therefore denied the right to use in the name of their party the word "Republican". The Supreme Court of Mississippi further expressed its opinion that the statute, as so construed, did

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[9] "It is the duty of every court to construe an act of the legislature as constitutional if it can reasonably be done.

"As it appears to this Court any act which provides that 'he who is first in time' might preempt a name of a political party by registering the same—if the act provided that and no more—would be unconstitutional.

"The Court believes that the legislature could not subject valuable rights to the result of a mere foot race, or who might reach the capitol first and register with the Secretary of State. Such would be dealing capriciously or whimsically with rights that this Court believes to be valuable and vested; and if the constitutionality of this act is to be preserved we must inquire further into this feature to see if the mere prevalence in time is the sole controlling factor.

"It appears to this Court that prevalence in time is by no means the controlling factor of this act.

"The act is carefully and judicially drawn so as to protect the rights of all parties.

"There are two elements to the act, one is that the Secretary of the several parties shall register the name of the party with the Secretary of State.

"The second feature, and it is essentially a part of the act and prescribed the character of the party sought to be registered, so that only those parties may be registered which complied with certain acts which we will designate as precedent acts.

"The precedent acts are laid out in Chapter 308 of the laws of 1948. The precedent acts consist of an organization process whereby the polit-

not violate the Mississippi Constitution nor the provisions of the Constitution of the United States. One of the Justices vigorously dissented.

By its judgment, the Supreme Court of Mississippi did "order and adjudge that the judgment of said lower court is hereby reversed and the registration of Mississippi Republican Party is hereby reinstated the registration of Republican Party of Mississippi is hereby cancelled."

We find no difficulty in deciding that the plaintiffs are not estopped in any way by having assumed an inconsistent position in the petition seeking the issuance of a writ of certiorari by the Supreme Court of the United States. The reasons are that the petition was not successfully maintained and that the defendants were not misled or prejudiced in any way. See Davis vs. Wakelee, 156 U.S. 680, 689; 19 Am. Jur., Estoppel, Sec. 72; Id. p. 712, note 11, Sec. 73; cf. Livesay Industries, Inc., et al. vs. Livesay Window Company, Inc., 5th Cir., 202 F. 2d 378.

The defense of res judicata, however, presents the most difficult problems in this case. The validity of that defense must be determined by federal law. That is true because

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ical parties begin at the precincts and work up through the county sites, culminating their efforts in a convention in the Capitol, at which a chairman is elected, a secretary is elected, a national committeeman and a national committeewoman elected, and presidential electors named.

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"Therefore I would rule that the act is constitutional upon the theory that the legislature knew at the time that there were no parties subject to be registered bearing the same name that had the qualifications hereinabove mentioned; to report a name available to the secretary, and a history of the proceedings had and done under chapter 308 of the laws of 1948, and within the period of time outlined therein.

"Name is of the essence of the act, and since the very name itself is the significant and controlling feature of the act, the name enjoyed and used during the time that the said precedent acts were being performed, and which constitute essentially a part of the characteristics of the party sought to be registered, would have to prevail.

"Therefore the Court would rule that the defendant party although at the time the registration was had, was going under the name of Mississippi Republican Party, still it was not subject to be registered under the act, because during the period of time when the necessary precedent acts prescribed by chapter 308 of the laws of 1948 were being performed, the party enjoyed and used another name."

this Court sits not as did the District Court in the diversity case of Angel vs. Bullington, 330 U.S. 183, simply as another court of the state, but as a federal court having the primary duty to enforce the Constitution of the United States; and, hence, to decide whether the defense of res judicata under the facts and circumstances of this case is a bar to the plaintiffs' action. In this national area "there has always been and must continue to be federal-judicially declared law, which may properly be described as federal common law." Moore's Commentary on the United States Judicial Code, p. 340, Sec. 0.03(45).

For the application of the defense of res judicata, a number of factors must be considered, a few of which we will briefly discuss:

(a) The Parties. The parties to the action decided by the Supreme Court of Mississippi and to this suit would appear to be practically identical. On the record the parties' plaintiff are identical, and the official positions of the defendants are the same. Two of the defendants' party officials were different individuals, but that seems to us wholly immaterial. However, when we look beyond the paper record, we must observe that both actions were filed by the plaintiffs on behalf of themselves and of all the members of the Republican Party of Mississippi. Insofar as the actions seek the protection of no more than a property right jointly owned, they may be termed true class actions to which the doctrine of res judicata would be applicable. Supreme Tribe of Ben-Hur vs. Cauble, 255 U.S. 356; 3 Moore's Federal Practice (2d ed.), Sec. 23.11, p. 3460; A.L.I., Restatement, Judgments, Sec. 86. That is not true, however, when we consider that the underlying purpose of protecting the so-called property rights in the Party's name is to protect and enforce the civil rights of the members of the Party. The right of suffrage is separately possessed by each individual voter. So considered, the actions should properly be classed as spurious class actions in which the defense of res judicata would not be valid as against the members of the Party represented by plaintiffs. Wabash Railroad Co. vs. Adelbert College, 208 U.S. 38; 3 Moore's Federal Practice (2d ed.), Sec. 23.11, pp. 3465-8. The appli-

cation of this principle, however, is especially difficult in the present case, because the members of the Party were and are represented in both actions by the same Party officials. Do we then have the situation where the rights of the members should be denied enforcement in the present action, because their representatives are barred by res judicata? Without deciding that question, we suggest that, if necessary, a court of equity can mold its decree to meet the peculiar situation; and further, as to the named parties' plaintiff, that in the event it should finally be determined that the Supreme Court of Mississippi was in error in its view that the statute as construed by it did not violate the Constitution of the United States, it would be unjust to apply one rule of law as to the named parties' plaintiff and a different rule of law as to the members of the Party represented by them. Cf. A.L.I., Restatement, Judgments, 1948 Supplement, Sec. 70, pp. 340-343.

(b) CAUSES OF ACTION. Are the causes of action in the two suits identical? It is forcibly urged that the judgment of the Mississippi Supreme Court not only granted registration to the Mississippi Republican Party, but also denied registration to the Republican Party of Mississippi, and hence included the cause of action here asserted. In close cases few questions of law present more difficulty than the concept of a cause of action as related to res judicata. It has been said that: "A cause of action does not consist of facts, but the unlawful violation of a right which the facts show." Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 321; see American Fire & Casualty Co., vs. Finn, 341 U. S. 6, 12, 13. Professor Moore favors an "empirical approach" toward a cause of action as related to res judicata. 2 Moore's Federal Practice (2d ed.), Sec. 2.06, p. 378. In a recent article on "Developments In the Law of Res Judicata" in 65 Harvard Law Review, pp. 818, 824, the following are mentioned among the most common rules for determining whether the second action is foreclosed if:

> "(a) the same principles of substantive and procedural law are applicable to both actions, (b) the same right is alleged to be infringed by the same wrong in both actions, (c) the judgment sought in the second action

would infringe rights established in the first, (d) the same evidence would support both actions, or (e) the operative facts are the same in both actions."

It is stated that, "Precedent is haphazard in this field; on a given set of facts there seems to be at least one rule to buttress any result, and the same tests often can sustain opposite positions." The author notes, however, that, "An examination of what seem to be the real policy considerations indicates * * * that fairly uniform rules may be followed with respect to specific fact situations." The policy considerations discussed in the article are captioned, "Trial Convenience", "Stability", "Countervailing Policies", "Effect of Waiver, Fraud, and Mistake on Merger". Cf. A. L. I., Restatement, Judgments, pp. 239, et seq.

What the Mississippi Circuit Judge said as to the constitutionality of the statute was in connection with its construction. The primary objective of the action in the state court was to secure a proper construction of the statute, the plaintiffs contending that the statute must be construed to afford them relief in order to sustain its constitutionality. The judgment of the Supreme Court of Mississippi does not mention the constitutionality of the statute. Its opinion in that respect may be referred to the statute's construction by way of showing that the Circuit Judge was in error in holding that he must construe the statute as he did in order to sustain its constitutionality. The claim adjudged was the right to relief under the Mississippi statute, the exclusive right to the use of the name "Republican". The claim now sought to be enforced is the right to relief against or despite the Mississippi statute, the right to the use by the plaintiffs, not exclusive of the defendants, of the name "Republican". The plaintiffs argue that they are not foreclosed from struggling for co-existence, because they have been beaten in a war of extermination.

From the viewpoint of trial convenience, we may observe that an authoritative construction of the statute by the State Supreme Court was necessary before this Court could proceed with a suit to enjoin its enforcement and execution as violative of the Constitution of the United States. 28 U. S. C. A. 2284(5). Shipman vs. DuPre, 339 U.S. 321.

The federal courts will not assume, in advance of decision by the state court of last resort, that that court will place such a construction upon a statute as will render it obnoxious to the federal Constitution. *Utah Power & Light Co.* vs. *Pfost,* 286 U. S. 165, 186; *Arizona Copper Co.* vs. *Hammer,* 250 U. S. 400, 430; *Pelton* vs. *Commercial National Bank,* 101 U. S. 143. It is natural, therefore, and even necessary for plaintiffs to proceed first in the state courts to secure a construction of the statute.

(c) Collateral Estoppal—Questions of Law. "Where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' " *Mercoid Corporation* vs. *Mid-Continent Co.,* 320 U. S. 661, 671; see also *United States* vs. *International Building Co.,* 345 U. S. 502, 504, 505; *Cromwell* vs. *County of Sac.,* 94 U. S. 351, 353; *Russell* vs. *Place,* 94 U. S. 606; *Peckham* vs. *Family Loan Co.,* 5th Cir., 196 F. 2d 838, 840, 841; *Travelers Ins. Co.* vs. *Commissioner of Internal Revenue,* 2d Cir., 161 F. 2d 93, 95; A. L. I., Restatement, Judgments, Sec. 68.

If the second cause of action is upon a different claim, the prior judgment is not res judicata as to questions of law, except where both causes of action arose out of the same subject matter or transaction and that exception does not apply where injustice would result. A. L. I., Restatement, Judgments, Sec. 70, pp. 318, 322, 324; 1948 Supplement, Sec. 70, pp. 341, 342; 50 C. J. S., Judgments, Sec. 712, p. 176; *Sonken-Galamba Corp.* vs. *Atchison, T. & S. F. Ry. Co.,* 28 F. S. 456, 7th headnote, affirmed and approved 124 F. 2d 952, 954, 955, certiorari denied 315 U. S. 822.

(d) Federal Constitutional Questions. It has been said that: "A determination of a federal constitutional question by a state tribunal is not conclusive if there is no right of appeal to the federal courts." *Garland Co.* vs. *Filmer,* 1 F. S. 8, 12; cf. *LeBlanc* vs. *Southern Production Co.,* 5th Cir., 202 F. 2d 245. In *Angel* vs. *Bullington,* 330 U. S. 183, 205, footnote 11, Mr. Justice Rutledge dissenting properly observes that: "The Court clearly implies that Bullington

would not be foreclosed on res judicata by the North Carolina decision if his route to this Court for review had been by certiorari rather than by appeal." (See particularly the part of the Court's opinion beginning on p. 189.) In this case, as we have noted, the defendants contend with much reason that the plaintiffs, who were the appellees in the Mississippi Supreme Court, had a right of appeal from the judgment of that Court to the Supreme Court of the United States. Whether the proper mode of review is by certiorari or appeal is often, however, a matter of considerable doubt. The plaintiff's counsel undertook to proceed by petition for certiorari.

The United States Courts are the peculiar guardians of the Constitution of the United States. The decisions of even the highest state courts are not binding upon federal courts concerning questions arising under the Constitution of the United States. If we were concerned simply with an application of the doctrine of stare decisis, it would be clear that we are not bound by the opinion of the Supreme Court of Mississippi. When all that is involved is the decision of a pure question of law, it seems doubtful whether a different result should follow because we call the doctrine res judicata rather than stare decisis.

(e) Equitable Relief From Judgments for Accident or Mistake. Appearing in the record is an affidavit of plaintiff's counsel, who filed the untimely petition for certiorari to the Supreme Court of the United States from the judgment of the Supreme Court of Mississippi, explaining his conduct as caused by unavoidable illness and mistake. Sickness has been recognized as a ground of equitable relief from judgments; 31 Am. Jur., Judgments, Sec. 637; Note 30 L. R. A. 794; and accident is, of course, one of the well recognized grounds on which equitable relief may be granted against judgments. 31 Am. Jur., Judgments, Sec. 636; cf. A. L. I., Restatement, Judgments, Chapter 5, pp. 531, et seq. We do not think it necessary, however, in this case to pass upon the sufficiency of this claimed equitable ground for relief from the failure to appeal from the judgment of the Supreme Court of Mississippi to the Supreme Court of the United States.

(f) Countervailing Policies. We have discussed a number of the factors entering into the application of the doctrine of res judicata which give pause to its application in the present case. We prefer, however, to base our decision upon considerations of public policy to which the doctrine of res judicata should yield. As was stated by Judge Hutcheson in Holmes vs. Donald, 84 F. 2d 188, 190, "It [res judicata] is not a Procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently, determined." Mr. Justice Rutledge in his dissenting opinion in Angel vs. Bullington, supra, at p. 203, made, it seems to us, a sound observation, not in conflict with the opinion of the Court in that case, to the effect that it is not every case "in which the policy of stopping litigation outweighs that of showing the truth." In Mercoid Corporation vs. Mid-Continent Co., supra, at p. 670, Mr. Justice Douglas, speaking for the Court, said:

> " 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' Virginian Ry. Co. v. System Federation, 300 U. S. 515, 552. 'Where an important public interest would be prejudiced,' the reasons for denying injunctive relief 'may be compelling.' Harrisonville vs. Dickey Clay Co., 289 U. S. 334, 338. And see United States v. Morgan, 307 U. S. 183, 194. * * * That principle is controlling here. The parties cannot foreclose the courts from the exercise of that discretion by the failure to interpose the same defense in an earlier litigation. Cf. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173."

We feel a compelling reluctance and unwillingness to hold that the members of the Republican Party of Mississippi, inadequately represented in securing a review by the Supreme Court of the United States of the judgment of the Supreme Court of Mississippi, are now foreclosed from seeking protection in the United States Courts of their rights under the Constitution of the United States. If the rule

of the Mercoid case, supra, that a strict application of the doctrine of res judicata should yield to considerations of the public interest which might be adversely affected was soundly applied in patent litigation, where private interests are also involved; then we think that, a fortiori, the principle is more strongly applicable, indeed controlling, where, as here, the effective rights of suffrage of the members of an organized political party are at stake. A right decision as to the constitutionality of the statute, subject to effective review by the Supreme Court of the United States, is of so much public importance that, in our opinion, it supersedes the rule of res judicata. The motions of the defendants for summary judgment are therefore denied.

In addition to their motions for summary judgment, the defendants answered, insisting that the statute as construed by the Mississippi Supreme Court was valid and Constitutional, and also filed various counterclaims; and the plaintiffs filed motions to strike and to dismiss addressed to the counterclaims. All of these matters were carried with the case, except that no evidence was taken upon the issues presented by the counterclaims, the Court ruling that, if that became necessary, such evidence would be taken on a separate hearing. See Rules 13(i) and 42(b), Federal Rules of Civil Procedure.

There was introduced in evidence by stipulation the entire transcript of the record before the Supreme Court of Mississippi in Hoskins, et al. vs. Howard, et al., supra. There were further stipulations and some oral testimony, none of which is seriously controverted. This Court finds as facts the same facts stated in the opinion of the Supreme Court of Mississippi in Hoskins, et al. vs. Howard, et al., supra, and the facts found by the Circuit Court of Hinds County, Mississippi, as set forth in the record in said cause.

We proceed to a discussion and decision of the constitutionality of the statute as construed by the Supreme Court of Mississippi. The right existing in the State of Mississippi to regulate primary elections, to prescribe the form of the ballot, and otherwise reasonably to supervise the activities of political parties is in no way denied. The state legislature has full power and authority to enact all

reasonable provisions for distinctive party emblems and insignia, and for other means to avoid confusion among the voters or any occasion therefor, provided the terms of the statute are reasonably adapted to the ends to be served and are not violative of constitutional rights.

The gist of the plaintiffs' claim is not that the entire Mississippi statute is unconstitutional, but only that part which has been construed by the Supreme Court of Mississippi to deny to a political party existing at the time of enactment the right to register and continue to use its name solely because another political party had already been registered using a part of the same name.

The construction of the State statute by the highest court of the State is binding upon this Court. Georgia Ry. & Electric Co. vs. Decatur, 295 U. S. 165, 170; Burns Mortgage Co. vs. Fried, 292 U. S. 487, 493-4. As said in Hartford Accident Company vs. Nelson Co., 291 U. S. 352, 358:

> "As to the meaning of the statute now challenged as invalid the Supreme Court of Mississippi speaks with ultimate authority. • • • the only question in this court is whether the result is consistent with the Constitution of the United States."

It is, of course, settled that the administration and construction of a law may render it unconstitutional. Davis vs. Schnell, 81 F. S. 872, affirmed 336 U. S. 933; Yick Wo vs. Hopkins, 118 U. S. 356, 373.

With all deference to the views of the Supreme Court of Mississippi, for which we entertain a very high respect, we find ourselves in complete agreement on the Constitutional question with the contrary views expressed by the learned State Circuit Judge, and with those so well expressed by Justice Lee in his dissenting opinion. It seems clear to us that that part of the Mississippi statute which would deny to the Republican Party of Mississippi, a political party existing at and long before the enactment of the statute, the right to register and to continue to use its name, merely because another political party had already been registered using the name "Republican", is a denial of due process of law. It does not meet the constitutional

requirement of "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Daniel Webster in the argument of the Dartmouth College Case, Trustees of Dartmouth College vs. Woodward, 4 (Wheat) U. S. 518, 581. See States' Rights Democratic Party vs. State Board of Elections, 229 N. C. 179, 49 S. E. 2d 379, 384; 42 Am. Jur., Public Administrative Law, Sec. 135, 12 Am. Jur., Constitutional Law, Sec. 573, p. 268.

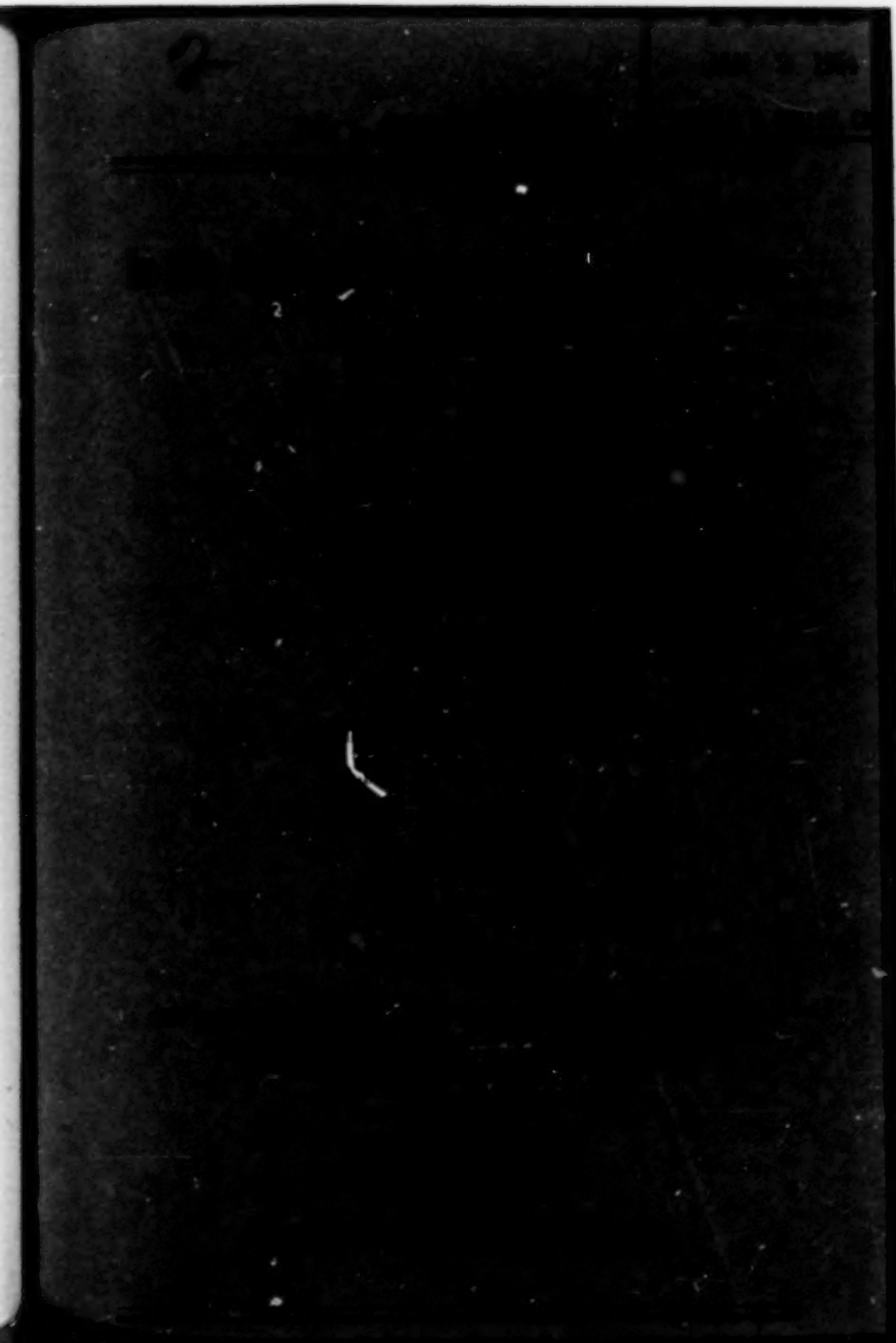
The Supreme Court of Mississippi relied upon the maxim *Prior Tempore Potior Jure*—"He who is first in time is preferred in right". That maxim, we think, has a limited field of operation. It contains no magic which would permit the transgression of rights guaranteed by the Constitution of the United States. The Mississippi Court refers to two applications of the maxim, the first with reference to the recordation of land conveyances. It seems settled that for recording laws to have a retrospective operation and be constitutional they must provide a reasonable time in which to record previously executed instruments. See Turner vs. New York, 168 U. S. 90; Vance vs. Vance, 108 U. S. 514; 45 Am. Jur., Records and Recording Laws, Sec. 31. The other reference to an application of the Latin maxim is a recent Mississippi statute dealing with the registration of brands of cattle and livestock. Such brands are intended merely for purposes of identifying the animals and of discouraging theft, and have little relation to any concept of good will contained in the rallying cry of the name of a political party. Even so, it must, of course, be true that the title to cattle already branded would not be affected by the subsequent registration of the brand.

The statute in question bears a closer analogy, it seems to us, to a statute of limitations, which would shorten the time within which suits to enforce existing causes of action may be commenced, and which to be valid must provide in each case a reasonable time for the commencement of suit before the bar takes effect. Ochoa vs. Hernandez, 230 U. S. 139, 154; Wheeler vs. Jackson, 137 U. S. 245, 255; McGahey vs. Virgininia, 135 U. S. 662, 705, et seq.; Terry vs. Ander-

son, 95 U. S. 628, 633; 34 Am. Jur., Limitation of Actions, Sec. 18,

The same principle has been applied to protect the right of suffrage. Guinn vs. United States, 238 U. S. 347; Lane vs. Wilson, 307 U. S. 268.

The counterclaims filed by the defendants were all predicated upon the assumption that the plaintiffs would fail in their action in this Court and need not, therefore, be given separate consideration. Said counterclaims are hereby dismissed. There is no reason for the issuance of an injunction against the defendants other than the Secretary of State. See St. John vs. Wisconsin Board, 340 U. S. 411, 414, 415. Those defendants should, however, be taxed with the costs of court. The Secretary of State is not interested in the outcome of this litigation, other than to perform his official duty, while the other defendants have been the prime movants in denying registration to the Republican Party of Mississippi. It is ordered, adjudged and decreed that a mandatory writ of injunction issue against the defendant Heber Ladner as Secretary of State for the State of Mississippi requiring him to register the Republican Party of Mississippi pursuant to the remaining valid provisions of Chapter 458 of the Mississippi Laws of 1950 and of Sections 3107-01 to 3107-09 of the Mississippi Code of 1942, as amended. The costs of court are taxed against the defendants other than the Secretary of State.



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In the Supreme Court of the United States

No. 501 MISC.

October Term, 1953

ON APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

SUPPLEMENT TO JURISDICTIONAL STATEMENT

CHAPTER 308
GENERAL LAWS OF
THE STATE OF MISSISSIPPI, 1948
(Miss. Code 1942, Sec. 3107, p.p.)

SENATE BILL NO. 386

AN ACT to amend section 3107, Mississippi code of 1942, so as to provide that the state executive committee shall designate the date for precinct elections for delegates to the county convention.

Be it enacted by the Legislature of the State of Mississippi:

Section 1. That section 3107, Mississippi code of 1942, be and the same is hereby amended to read as follows:

3107. State, district and county executive committees—how chosen.—The state executive committee shall consist of three members from each congressional district, to be chosen by the delegates from the different congressional districts, each district acting separately, and shall hold for four years and until their successors are chosen. A state convention shall be held by each political party in the state, in the year 1948, and every four years thereafter, to select a state executive committee, to appoint delegates to the national convention and to nominate presidential electors. Each county shall be entitled

in the state convention to a number of votes equal to double its representation in the house of representatives. The delegates are to be selected by county delegate conventions, to be held in each county. Delegates shall be apportioned equally among the supervisors' districts of each county, or each precinct in the county may be given representation in the county delegate convention in proportion to the votes cast as the preceding presidential election for its party candidates. The state executive committee, or the chairman thereof, shall designate a date, giving at least ten days' notice, for the precinct elections, on which date the electors at such precinct shall meet at ten o'clock a. m. at the usual voting places, and by secret ballot elect delegates to represent such voting precincts in the county convention. The county executive committee shall designate the number of delegates to be elected, and if it fail to designate a number each precinct will be entitled to one delegate in the county convention. The delegate convention of each county shall choose a county executive committee, consisting of three members from each supervisors' district as above provided, and the county executive committee may, in their discretion, select from the county at large three (3) additional members of the committee, who shall hold until the county convention convenes four years later, but a county executive committee can submit the choice of their successors to any primary election held for other purposes, in which event the committee so chosen shall hold until next county convention assembles under the provisions of this section. Flotorial and senatorial executive committees shall continue in office until after the returns are received and acted upon for the next general election, after which their successors are to be appointed by the various county executive committees composing such districts. All the present executive committees now acting shall continue until their successors are chosen, as herein provided. All vacancies in state and county executive committees shall be filled by such committees themselves and from the district in which the vacancies

occur. All other vacancies are to be filled by the new executive committeemen, appointed by the county executive committees of the counties which made the original appointments. Executive committees for senatorial and flotorial districts having none, may be appointed by the various executive committees of the counties composing such districts. In any new county hereinafter created the members of the executive committee or committees for the county or counties from which the new county is taken who are resident citizens of the new county, at the time it is created shall constitute the first executive committee for the new county until their successors are selected in the manner provided by law, and they may fill any vacancy on the committee.

Section 2. That this act take effect and be in force from and after its passage.

Approved March 10th, 1948.

CHAPTER 458
GENERAL LAWS OF
THE STATE OF MISSISSIPPI, 1950

(Miss. Code 1942, Sections 3107.01 to 3107.09)

HOUSE BILL NO. 912

AN ACT to provide for registration of political parties in the State of Mississippi with the secretary of state; to amend Chapter 11 of the Mississippi laws of the first extraordinary session of the Mississippi Legislature of 1947; and for related purposes.

Be it enacted by the Legislature of the State of Mississippi:

Section 1. The chairman or secretary of the state executive committee of each political party chosen as provided in section 3107, code of 1942, as amended by chapter 308, Mississippi laws of 1948, shall register the name of the political party it represents with the secretary of state within thirty (30) days after the effective date of this act. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the secretary of state by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary of state.

Any political party hereafter organized under the laws of this state shall register with the secretary of state in the manner as herein provided and within thirty (30) days after such organization.

Section 2. The application for registration of the party named to be presented to the secretary of state shall be accompanied by an affidavit of the chairman or secretary of the party seeking such registration, listing the names of the members of the State Executive Committee, showing the chairman and secretary, together with the names of the national committeeman and committeewoman, and all the officers of said party, and setting forth that said executive committee and other officers of such party have been elected in accordance with

the provisions of chapter 308, laws of 1948, or any laws supplementary or amendatory thereof, and the secretary of state is authorized to require further proof as to the compliance with the provisions of said chapter 308, laws of 1948, when, in his opinion, such party has not complied with same.

The chairman or secretary of the district and county executive committees of each political party, chosen as hereinabove provided in Section 1 hereof, shall register the name of the political party it represents with the chairman or secretary of the state executive committee of such political party within thirty (30) days after the effective date of this act, and the application for registration shall be accompanied by an affidavit of the chairman or secretary of the party seeking such registration, listing the names of the members of the district executive committee and of the state executive committee, as the case may be, showing the chairman and secretary and other officers of said party, and setting forth that said executive committee of such party has been elected in accordance with the provisions of chapter 308, laws of 1948, or any laws supplementary or amandatory thereof, and the chairman or the secretary of the state executive committee is authorized to require further proof as to the compliance with the provisions of said chapter 308, laws of 1948, when, in his opinion, such party has not complied with same. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the chairman or secretary of the state executive committee by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary or chairman of the state executive committee.

Section 3. No political party in the State of Mississippi shall conduct primaries or enter candidates in any election unless such party shall have been duly organized under the

provisions of chapter 308, Mississippi laws of 1948, and amendments thereto, and the name of such party shall have been registered as provided in this act.

Section 4. If any person shall claim, or represent himself in any manner to be a member of any state, district or county executive committee of any political party in this state, or claim to be the national committeeman or national committeewoman or any other officer or representative of such political party without having been lawfully elected or chosen as such in the manner provided by the laws of this state, or by such political party in the manner provided by the laws of this state, including chapter 308 of the Mississippi laws of 1948, and laws amendatory thereof, or shall in like manner claim to be the nominee of any political party authorized by the laws of this state to hold primary elections and choose party nominees, when in fact such person has not been declared the nominee of such political party for such office by such political party operating under the laws of this state, such person shall be barred from participating in any primary election held by such party, and shall not be a candidate, and the name of such person shall not be placed on the ticket as the candidate of such party in any election held in this state. Any person who violates the provisions of this section, in addition to other measures or penalties provided by law, may be enjoined therefrom upon application to the courts by any person or persons, or any political party, official, or representative of such political party, aggrieved thereby.

Section 5. If any person shall claim, or represent himself to be a member of a primary political party during any primary election campaign or during any primary election when in fact such person is not eligible under the laws of this state to participate in such primary held by such political party and such person does not intend to support the nomination to be made at such primary election of such political party

and such person has not been in accord with such political party holding such primary within the two preceding years, or any part thereof, such person shall be barred from participating in such primary, and in addition to such other measures or penalties provided by law, may be enjoined therefrom upon application to the courts by any person or persons, political party, official or representative of such political party, aggrieved thereby.

Section 6. It shall be unlawful for any person or group of persons to set up or establish any political party in this state, except in the manner provided by the laws of this state, and it shall be unlawful for any person or group of persons not lawful members thereof to use or attempt to use or to operate under the name of any other political party theretofore and at the time lawfully existing and operating under the laws of this state, and each and every person participating in such unlawful act, in addition to such other measures or penalties provided by law, may be enjoined therefrom upon application to the courts by any person, or persons, or any political party, official or representative of such political party, aggrieved thereby.

Section 7. Chapter 11 of the laws of the first extraordinary session of the Mississippi legislature of 1947 be and the same hereby is amended to read as follows:

The ballot shall contain the names of all candidates who have been put in nomination, not less than fifteen (15) days previous to the day of election, by the primary election of any political party. There shall be printed on the ballots the names of all candidates so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. The commissioner shall also have printed on the ballot the name of any qualified elector who has been

requested to be a candidate for any office, by a written petition signed by at least fifteen electors, for any beat or municipal office in a town or village of less than three hundred (300) inhabitants, or fifty qualified electors for any other office, and when the petition or request has been presented to said commissioner not less than fifteen days before the election, but if any candidate has been so nominated, or has been so requested to become a candidate, less then fifteen (15) days before the election, his name shall not be printed upon the ballot. The ballot shall contain the names of each candidate for each office and such names shall be listed under the name of the political party such candidate represents as provided by law and as certified to the circuit clerk by the state executive committee of such political party. Or, in event a candidate qualifies as an independent as herein provided, he shall be listed on such ballot as an independent candidate.

Section 8. It is not the intention of this act to bar or prevent any person from becoming a candidate, voting, or otherwise participating in the Democratic primaries to be held in 1950 and 1951 solely because the candidate or voter has declared allegiance to the so-called National Democratic Party, rather than the regular and lawful Democratic Party in Mississippi.

It is therefore declared to be the legislative intent of this act that regardless of, and notwithstanding, the provisions of Section 5, or any of the other sections of this act, no person shall be barred or deprived of the right to vote or become a candidate in any of the primaries to be held by the regular and lawful Democratic Party in Mississippi during the years 1950 and 1951, solely because of having declared allegiance to or preference for the so-called National Democratic Party.

The electorate of Mississippi has a constitutional right of free expression by ballot which has never been denied in this state, and the right and privilege is hereby expressly granted to all who claim affiliation with, or set themselves up as representatives of, the so-called National Democratic Party, to

vote and/or become candidates under their proper label in the primaries to be held by the regular and lawful Democratic Party in the years 1950 and 1951, so that the voters of the state may again express themselves on the issues involved.

Provided, however, that nothing herein shall be construed as being in conflict with or otherwise affect any of the provisions of this act except to the extent and for the purposes as expressed and limited herein to the participation in the primaries to be held in the years 1950 and 1951.

Section 9. If for any reason any section, paragraph, or part of this act should be declared to be unconstitutional by any court of competent jurisdiction, such ruling shall not affect the validity of the other sections, paragraphs, or parts of this act, but the same shall remain in full force and effect.

Section 10. The purpose of this act is to provide additional remedies for the protection of the political parties of this state and this act is not to be construed as amending or repealing any law presently existing except as is provided in section 7 hereof, unless the provisions hereof are in conflict therewith, in which event the provisions hereof shall prevail.

Section 11. That this act shall take effect and be in force from and after passage.

Approved April 7, 1950.

IN THE SUPREME COURT
STATE OF MISSISSIPPI
HOSKINS, et al v. HOWARD, et al
May 26, 1952

No. 38,478 (59 So. 2d 263)
(Copied from 214 Miss. 481, 486)

Appeal from the circuit court of Hinds County; M. M. McGowan, Judge.

Petition by Perry W. Howard and others against J. E. Hoskins and others for a writ of certiorari to the Secretary of State, and for an adjudication that respondents' political organization was not entitled to registration under the name Mississippi Republican Party. Judgment for petitioners and respondents appealed. Reversed and judgment for appellants.

Hall, J.

Appellants on the one hand and appellees on the other constitute two warring groups, each of which claims the right to be registered under the name of the Republican party in this State. Chapter 458, Laws of 1950, provides that the chairman or secretary of the state executive committee of each political party chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Laws of 1948, shall register the name of the political party it represents with the Secretary of State within thirty days after the effective date of the act and that thereafter no political party shall use or register any name or part thereof which has already been registered with the Secretary of State by any other political party.

In 1928 appellants perfected an organization which they named the Independent Republican Party of Mississippi. Appellees prior to that time and since have constituted an organization which they named Republican Party of Mississippi. Each group has regularly held precinct, county and state conventions in accordance with the provisions of Section 5866, Code of 1930, which has been brought forward as Section 3107, Code of 1942, and amended by Chapter 308,

Laws of 1948. As a matter of history both groups have from time to time selected candidates for many of the public offices of the State and invariably the group represented by appellants has overwhelmingly polled a greater number of votes than the group represented by appellees. Notwithstanding this, the delegates to the Republican National Convention selected by the appellees have been recognized by that convention as representing the party in Mississippi.

After approval of Chapter 458, Laws of 1950, J. A. White, as the Secretary of the State Executive Committee composed of appellants, filed with the Secretary of State an application for registration of his group under the name of Mississippi Republican Party. A few days later this application was amended and thereupon the party was registered by the Secretary of State. Subsequent thereto C. T. Butler, as Secretary of the State Executive Committee composed of appellees, filed with the Secretary of State an application for registration of his group under the name of Republican Party of Mississippi and this application was denied by the Secretary of State for the reason that he is prohibited by said Chapter 458, Laws of 1950, from registering a second group using the word "Republican."

Appellees then brought suit in the circuit court of Hinds County seeking a writ of mandamus to compel the Secretary of State to cancel the registration of appellants and to register them as the Republican Party of Mississippi. The pleadings were subsequently amended so as to pray for a writ of certiorari commanding the Secretary of State to bring up the records of his office and for an adjudication by the trial court that because of error apparent upon the face of the record appellants were not entitled to registration. The writ was granted, the records brought up, and upon a hearing the trial court held that appellants were not entitled to registration and were improperly registered by the Secretary of State for the reason that they had changed their name from Independ-

ent Republican Party to Mississippi Republican Party. The registration by appellants was accordingly cancelled and the appellees were ordered registered as the Republican Party of Mississippi. From that order this appeal is prosecuted.

The records show affirmatively that the organization represented by appellants has been duly organized by precinct meetings, county conventions and state conventions. This does not seem to be seriously questioned by appellees. The learned trial court, however, found error of law upon the face of the record for the reason that the organization represented by appellants changed its name after the happening of the events required to be performed in 1948, and upon this sole ground entered the order from which this appeal is prosecuted. The record shows affirmatively, and it is not questioned, that the appellants in state convention, duly held in accordance with the law of this State, adopted a resolution providing that from and after the presidential election of November 2, 1948, the name of Independent Republican Party of Mississippi be changed to Mississippi Republican Party as the successor to said Independent Republican Party of Mississippi. This resolution did not in any manner change the organization or the membership or the officers and representatives of the group. It changed the name and nothing else, and in so doing it did not appropriate the word "Republican" for it had already been using that word for more than twenty years. For that period of time confusion had existed in this State in the use of the word "Republican" for the two rival groups had been using it continuously. Similar confusion had arisen in more recent years as to which of two rival groups were entitled to use the word "Democratic" in the designation of their respective organizations and it was apparently for the purpose of bringing order out of chaos that the Legislature adopted the aforesaid Chapter 458, Laws of 1950.

(Hn 1) We are of the opinion that the mere change in name of the appellants from Independent Republican Party of Mis-

sissippi to that of Mississippi Republican Party without any change whatsoever in the organization is not such a change as would justify a rejection of their application for registration and that the lower court erred in its holding. The 1950 statute provides that when one party registers with the Secretary of State, thereafter no political party shall use or register any name *or part thereof* which has already been registered. If appellants had not adopted a resolution making the aforesaid change in its name and had registered under their former name of Independent Republican Party the appellees would not have been entitled to register as the Republican Party of Mississippi. The change in name by appellants was effected by a resolution duly adopted by its state convention nearly two years before passage of the 1950 act, and such change could not by any stretch of the imagination have been declared for the purpose of coming under the act. The appellants were the first to register under the 1950 act and the fact that they changed the party name in the particulars stated does not bar them from such registration. **(Hn 2)** The Secretary of State under this act has "the power to hear evidence and decide facts. He proceeds upon inquiry and determines facts and in our judgment is an inferior tribunal having quasi-judicial powers." Power v. Robertson, 130 Miss. 188, 223, 93 So. 769, 772. The records brought up under certiorari fully support his action in registering the party represented by appellants as the Mississippi Republican Party. We are of the opinion that the mere change in name by this organization which has used the name "Republican" for more than twenty years and which under the change continues to use that designation is not sufficient to justify the action of the lower court in ordering its registration cancelled and in ordering the organization represented by appellees to be registered as the Republican Party of Mississippi.

In connection with a consideration of the matters presented by this appeal we think that some significance should be given to Section 7 of the 1950 act. By that section it is provided

that "The ballot shall contain the names of each candidate for each office and such names shall be listed under the name of the political party such candidate represents", etc. So far as has come to our attention, the first time Mississippi ever had a law requiring the names of candidates to be listed under the name of the political party represented by them was Chapter 312, Laws of 1948, and that statute applied only to candidates for presidential elector. Prior to the passage of the present act the names of all candidates for public office were listed on the official ballot without any designation as to the political party represented by them. Not only illiterate people but even well educated people who desired to vote a straight ticket were often in doubt as to which of the candidates were selected by the party of their choice. **(Hn 3)** Many, if not most, of the states have long since enacted laws providing that candidates shall be listed on the official ballot under the name of the party which selected them. The enactment of such laws is clearly within the power of the Legislature. As was said by the Supreme Court of Wisconsin nearly fifty years ago in the case of State ex rel. Cook v. Houser, Secretary of State, 122 Wis. 534, 100 N.W. 964, 972, "So the plan for an official ballot, and opportunity for party representation thereon, are matters of legitimate legislative creation; hence the conditions of party representation upon such ballot are purely within legislative control." In this same case it was further said, "The right to have the names of party nominees put on the official ballot under the party name is a right not existing at common law, but created by the statute." 100 N.W. 984.

The 1950 law does not prevent the organization of new parties for in the last paragraph of Section 1 thereof it is expressly provided that registration may be made by any political party hereafter organized. Moreover, it does not prevent any person from becoming a candidate for office for our law still remains in effect that candidates may be selected by po-

litical parties and in addition thereto candidates may have their names placed upon the official ballot by petition. Section 3260, Code of 1942. The third sentence in Section 7 of the 1950 act expressly makes provision for the placing of names on the ballot by petition in substantially the same words as Section 3260 of the 1942 Code, and the last sentence in Section 7 of the 1950 act likewise recognizes this method of having names placed on the ballot. Consequently the right of suffrage and the right to become a candidate for any office is not in anywise impaired or abridged by the act.

Chapter 312, Laws of Minnesota of 1901, M.S.A. Sec. 205.72 note, provides as follows: "A political party which has heretofore or shall hereafter adopt a party name shall alone be entitled to the use of such name for the designation of its candidates on the official ballot, and no candidate nor party subsequently formed, shall be entitled to use or have printed on the official ballot as a party designation, any part of the name of a previously existing political party. And in no case shall the candidate of any political party be entitled to be designated upon the official ballot as the candidate of more than one political party, and shall be designated upon the official party ballot in accordance with the certificate of nomination first filed with the proper officers."

A dispute arose between two parties and in passing upon this dispute in view of the quoted statute, the Supreme Court of Minnesota, in the case of Davidson v. Hanson, 87 Minn. 211, 211, 220, 91 N.W. 1124, 92 N.W. 93, 96, said: "The party name protection act does not restrict and we doubt if it could be made restrictive of, the right of the citizen to declare his choice of persons through the exercise of the franchise. It applies specifically in terms to the formal use of party names, not of individual preferences; and, while we have reached the conclusion that the use of the word 'Socialist' is an impairment of the rights of the Socialist-Labor party, it is not apparent that such use has been adopted for a fraudulent pur-

pose to deprive another party of material advantages. We are therefore of the opinion that the group or organization which has attempted to select the name 'Socialist' is entitled to personal recognition of its candidates upon the ballot. But we cannot choose for it the name 'Social Democrat,' which it has surrendered. We have, therefore, regarded it as our duty to authorize the placing of the name of its candidate for governor upon the state ballot, leaving the representatives of the party to promote the views he represents in any lawful way they see fit, but without the use of the word 'Socialist,' which, at present, belongs, under the party name act, to the Socialist-Labor party."

The suggestion has been made that the appellees' organization has been recognized by the Republican National Convention in preference to that of appellants. The national convention is a purely political organization and cannot alter the laws of a sovereign state. This was made clear in State ex rel. Cook v. Houser, Secretary of State, supra, wherein the Supreme Court of Wisconsin said: "In view of the foregoing, since the law of this state has provided the conditions under which the party nominees shall go upon the official ballot, how can it be reasonably said that the decision of the national convention of a party can nullify it? The answer seems so plain as not to warrant this extensive treatment of the matter. Nothing but the great importance of the case could be held to justify it. The moment the conventions performed their work of choosing candidates, the rights of such candidates to have their names placed upon the official ballot became irrevocable privileges, subject only to the legislative condition. That such condition could be displaced by any mere party authority, either within or without the state, dignifying it as paramount to the sovereign will of the people, and so binding its courts and its special tribunal created to decide the matter, does not seem to us to have support in reason or authority."

Analogous to the holding of the trial judge that the change in name of appellants' organization constituted the creation of a new party which under our law is entitled to no recognition until it organizes by precinct meetings, followed by county conventions and a state-wide convention composed of delegates selected at the county conventions, is the case of Kratzer v. Allen, 10 Colo., App. 492, 50 P. 209. That case dealt with the selection of party emblems or designs to be placed upon official ballots pursuant to a Colorado statute providing: " 'It shall be lawful to designate the political party, or nominating committee, by which each list of candidates is nominated, by an appropriate emblem or design, such as a flag, eagle, rooster, or other device, as may be set forth in the certificate of nomination: provided, no two sets of nomination shall use or have the same device, and each political party, or nominating committee, shall have the prior right to use the device used by it at the last similar election.' Sess. Laws 1894, p. 62, § 18." The National Silver Party selected a candidate for Mayor of the City of Denver and changed the emblem of the party to a photograph of its candidate. In passing upon the contention that the party had no right to change its emblem the Colorado court said: "We concede that a man may experience a revolution in his opinions, and may so change his attitude politically that his likeness, which at one time was a fitting device for the party to which he adhered, would afterwards, in the same relative situation, be ridiculous. In such case the party would not be likely to insist on its prior right to the emblem, although its doing so would be merely a matter of taste, for which it could not be called to account by reason of anything contained in the statute. But the statute does not contemplate that a party shall be bound by its first selection. It may choose a new device for each election, the only requirement being that the emblem chosen shall be appropriate, properly certified, and not one upon which another party has a prior claim. The Democratic party may discard its rooster, and the Republican party its eagle, and

select something else as representative of its organization, in perfect harmony with the language and purpose of the statute. We do not think the objections to the picture of Mr. McMurray as an emblem of the National Silver party well taken, and we must therefore reverse the judgment."

(Hn 4) Appellees challenge the constitutionality of the 1950 act on numerous grounds. It is contended that it denies appellees the right to peacebly assemble and petition the government as guaranteed by Section 11 of the Mississippi Constitution, that it denies the right of freedom of speech and of the press as guaranteed by Section 13 of the Mississippi Constitution, that it deprives appellees of their liberty and property without due process of law contrary to Section 14 of the Mississippi Constitution, that it violates Section 32 of the Mississippi Constitution in that it destroys the liberty of appellees to organize and associate themselves with others for political purposes and denies them the right to freely exercise their franchise, and that for the stated reasons it violates similar provisions of the Constitution of the United States. We do not agree with these various contentions. The act does not deprive appellees of their right to peaceably assemble and petition the government. It does not deny them freedom of speech and of the press. It does not deprive them of their liberty or property. It does not destroy their right to organize and associate themselves with others for political purposes, nor does it deny them the right to freely exercise their franchise. The act does not seek to prevent any of these things. Appellees still have their right to peaceably assemble and petition the government; they have their right of freedom of speech and press; they have their right to organize themselves for political purposes; in fact they have the right to continue their present organization and to select candidates for office in the manner provided by law, the only limitation being that they may not use the word "Republican" in the name which they select for their organization since it has already been ap-

propriated and registered by appellants. They are denied no other right by the act except the use of that one word. Certainly there is nothing in the act which denies them the right to freely exercise their right of suffrage.

In the case of State ex rel. Barnett v. Gray, 107, Fla. 73, 144 So. 349, 350, it was held that "The statutes defining political parties under the laws of Florida, and regulating the printing of the names of candidates on the general election ballots, do not violate sections 1 and 6 of the Declaration of Rights or abridge the privileges or immunities of citizens of the United States or disturb the 'domestic tranquility' that is contemplated by the Federal Constitution."

In Field v. Hall, Secretary of State, 201, Ark. 77, 143 S.W. (2d) 567, 570, the Supreme Court of Arkansas upheld the validity of an Act of the Legislature of that state which bars from the ballot un-American parties, and in so doing it said:

"Next and lastly it is argued that even though Act 33 of the acts of 1935 of the General Assembly vests the secretary of state with discretionary authority which may be controlled by courts and even though the record reflects substantial evidence in support of the finding and judgment of the court to the effect that the Communist party of Arkansas violates the act, yet the act itself is void and unconstitutional because it denies the right of suffrage to a person or group of persons and denies them their right of freedom of speech and freedom of the press. We cannot agree with appellants that the act is unconstitutional upon either ground urged. The act does not deal with the right of suffrage at all nor attempt to prohibit any political party or any members of a political party from carrying on a program of sedition or treason by radio, speech or press. It deals with political privileges only and not with civil rights. It does not prohibit the Communist party or any other party from advocating the overthrow of government by force or violence nor prohibit them from carrying on a program of sedition or treason by radio, speech or press. It simply denies them the political privilege of having their

names placed as candidates upon election ballots to be voted upon at an election in case they advocate or are affiliated with any other party which advocates the overthrow of our government by violence or advocate a program of sedition or treason by radio, speech or press. Neither the federal nor the state constitution in any way deals with or recognizes the nominations of candidates by political parties. Relative to the nominations of candidates by political parties the following statement is made in 9 R. C. L. 1064: "This is not, however, a constitutional right, but rather a political privilege, depending upon the will of the people, as expressed to their representatives in the Legislature, or in the absence of positive statutory law, upon the will of party adherence, expressed through conventions, caucuses, or otherwise, in accordance with the rules and regulations of political organizations.'

"We do not think there can be any doubt that the legislatures of the various states have authority to establish conditions precedent to the existence and operation of political parties.

"We think the act is constitutional because it in no way abridges the civil right of suffrage and the right to the freedom of speech."

A similar statute of Ohio was upheld in the case of State ex rel. Berry v. Hummel, Ohio App., 59 N.E. (2d) 238.

These decisions make clear the distinction between the rights of political parties and the rights of individuals guaranteed under the Constitution.

(Hn 5) The trial judge was under the impression that the plain provisions of Chapter 458, Laws of 1950, were invalid in authorizing the Secretary of State to register the name of the first political party applying for registration. *Prior Tempore, Potior Jure.*— "He who is first in time is preferred in right,"—is a maxim which has long been recognized in the jurisprudence of this country. 50 C. J. 325, and authorities cited is note 51. In law courts it is similar to the equitable

maxim "Equity aids the vigilant and not those who slumber on their rights." It is a familiar rule that ignorance of the law excuses no one, or that every person is charged with knowledge of the law. Under this law the appellees were charged with knowledge of the 1950 act. The first quoted Latin maxim finds many applications under our law. A reference to two of these should suffice. One of the oldest under our law is found under our statutes with reference to the recordation of land conveyances. Regardless of the date of conflicting conveyances, the first one filed for recordation is given priority. The most recent statute which recognizes this principal is Senate Bill 149, Laws of 1952, which deals with the registration of brands of cattle and livestock and which gives to the first applicant the right to register his brand notwithstanding the fact that it may have been used for many years by some other person. Under the aforesaid 1950 act the appellants were the first to register their organization with the Secretary of State, and the appellees did not file their application for registration until nearly three weeks later. We are of the opinion that the Mississippi Republican Party was properly and legally registered and that the appellees were not entitled to registration of their organization under a party name which uses the word "Republican".

For the views herein expressed the judgment of the lower court will be reversed and a judgment will be here entered reinstating the registration of Mississippi Republican Party and cancelling the registration of Republican Party of Mississippi as ordered by the lower court.

Reversed and judgment here.

McGehee, C. J., and Roberds, Alexander, Holmes, Arrington and Ethridge, JJ., concur.

Kyle, J., took no part.

Lee, J., (dissenting).

Section 247 of the Constitution is in these words: "The legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates."

Section 5, Article 3 of the Constitution provides as follows: "All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."

Section 6, Article 3 of the Constitution provides as follows: "The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States."

"The political franchises of the citizen are given and secured by the constitution of the state, and cannot exist except as therein provided. These rights, though sovereign and fundamental, can have force and operation only through the forms established by law for their expression. * * * Since the opinion of Chief Justice Holt in the great case of Ashby v. White, 2 Ld. Raym., 938, the right of suffrage (a political not a natural, right) has been held to rest upon a basis as secure as rights of life, liberty, and property." McInnis v. Thames, 80 Miss. 617, 32 So. 286.

But it is only through political parties that the people assert their will. James Bryce in The American Commonwealth (1889), Vol. I, page 636, said: "The spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a party association and organization are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. They transmit the motive power, they determine

the directions in which the organs act. A description of them is therefore a necessary complement to an account of the Constitution and government; for it is into the hands of the parties that the working of the government has fallen."

Clearly, the people have the right to organize and operate parties.

"The people have an inalienable right to organize and operate political parties". Sarlls v. State, ex rel. Trimble, 201 Ind. 88, 166 N.E. 270, 277, 67 A. L. R. 718.

In State of Wisconsin, ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 35 L. R. A., N.S., 353, it was held:

> "The right of suffrage includes the right to form political parties, and the right of each party to have all the machinery, not reasonably prohibited by law, for making its organization effective as to the policy of its members, by electing officers in harmony therewith.
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> "Every legislative interference with freedom of voters to form political organizations and act under their respective party names is, at the same time, an interference with the right to vote; so the limit of power as to one is substantially the limit as to the other." See also Britton v. Board of Election Commissioners, 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115.

Our State has expressly authorized and sanctioned the organization and operation of political parties. Section 3256, 3257, Code of 1892; Section 3699, Code of 1906; Section 3107, Code of 1942.

The Republican party in Mississippi has existed in the State for many years. It appears that a schism developed in 1928, and the Independent Republican Party of Mississippi was formed. These organizations were not two factions within one party, but two distinct parties, each of which had *Republican* in its name. Both maintained their organizations and voiced their will through them. In 1948, the Independent party changed its name to Republican Party of Mississippi.

When the Legislature enacted Chapter 458, Laws of 1950, it pronounced the death sentence on one of these parties. They could not both register simultaneously. The one first filing with the Secretary of State would be recognized. The other could not register because its name would coincide with a part of the name already registered. What was certain to happen did happen. In the foot race, appellants got to the Secretary of State first. They were registered. Appellees were refused registration. They were thus put to political death not as a result of a trial, after due process, in which guilt of such offense as would merit their condemnation was established. They were put to death because of their name. They can neither conduct primaries nor enter candidates in any election. Section 3 of the Act. Yet, the only means by which their adherents can give expression to their political beliefs and principles is by entering in elections candidates, who subscribed to such beliefs and principles. Whatever the number of such adherents — and that fact is immaterial, whether it be great or small—this act deprives them of a valuable right, in direct violation of Section 14, Article 3 of the Constitution, which is as follows: "No person shall be deprived of life, liberty or property except by due process of law."

The irony of this situation is found in the Third Paragraph of Section 8 of the Act which says: "The electorate of Mississippi has a constitutional right of free expression by ballot which has never been denied in this state * * *." Unquestionably the above quotation expresses the political philosophy of our State, and yet the act in which it is found denies to these appellees and their adherents the very constitutional right which the act affirms.

The majority opinion gratuitously suggests that the legislative purpose was to avoid confusion in the use of names, and to bring order out of chaos. But, Section 10 of the Act

says that: "The purpose of this act is to provide additional remedies for the protection of the political parties of this state * * *." The Legislature knew that there were established parties then in existence in the State. While the act says it was designed to protect such parties, it, in fact, destroyed this one. Moreover, if confusion was the purpose, the Legislature waited a long time to do anything about it.

There is a wide distinction between our statute and the case involving a Minnesota law cited in the majority opinion in Davidson v. Hanson, 87 Minn. 211, 220, 91 N.W. 1124, 92 N.W. 93. The prohibition in that law was against the subsequent formation of a party. "* * * no candidate nor party *subsequently formed* shall be entitled to use or print on the official ballot as a party designation, any part of the name of a previously existing political party." In the case before us, the appellees did not form their party after the passage of our act. The party was then formed, and had been formed for many years.

I think that the act, insofar as it excludes an established party because of its name, is contrary to our whole philosophy of political freedom, and in violation of fundamental and constitutional rights. To that extent, I think the act is unconstitutional.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil No. 1974

PERRY W. HOWARD, SR.
EDNA E. REDMOND
S. W. MILLER AND
C. T. BUTLER,

PLAINTIFFS

v.

HEBER LADNER
J. E. HOSKINS
J. A. WHITE
GEORGE L. SHELDON AND
MRS. PAUL GAMMILL,

DEFENDANTS

COMPLAINT FOR A PERMANENT INJUNCTION AGAINST THE ENFORCEMENT OF A STATE STATUTE ON THE GROUNDS OF UNCONSTITUTIONALITY, FOR A DECLARATORY JUDGMENT, AND FOR OTHER RELIEF.

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1. All parties hereto, both plaintiff and defendant, are citizens and residents of the State of Mississippi and citizens of the United States.

2. The jurisdiction of this Court is invoked under the provisions of Title 28, Sections 41 (1) (a); 2281; 2284; 2201 et seq. United States Code, this being a case involving the constitutionality of a state statute which contravenes the rights of the plaintiffs guaranteed under the Constitution of the United States.

3. Plaintiff Perry W. Howard, Sr., is the National Committeeman of the Republican Party of Mississippi; Plaintiff, Edna E. Redmond is the National Committeewoman of said Party; Plaintiff, S. W. Miller is the Chairman of the State Executive Committee of said Party; and the Plaintiff, C. T. Butler, is the Secretary of the State Executive Committee of said Party; the Republican Party of Mississippi consists of thousands of members, too numerous to enumerate here; plaintiffs therefor bring this suit in their own name as officers and members of the Republican Party of Mississippi, and as citizens of the State of Mississippi, and also on behalf of all the members of the Republican Party of Mississippi, who are similarly situated and have a common grievance against the defendants herein named and all others who subscribe to and support the acts herein complained against.

4. Defendant Heber Ladner is the duly elected and qualified Secretary of State for the State of Mississippi and is sued herein in his representative capacity as an official of the State of Mississippi charged with, and acting in, the enforcement of the statute hereinafter complained of.

5. Defendant J. E. Hoskins is the Chairman of the State Executive Committee of an organization heretofore known as the "Independent Republican Party of Mississippi; J. A. White is the Secretary of the State Executive Committee of said organization; George L. Sheldon is the National Committeeman of said organization; and Mrs. Paul B. Gammill is the National Committeewoman of said party; they, and each of them, are sued in their individual capacities, in their

official capacities as officers and representatives of the aforesaid political party, and as representatives of all other persons claiming to belong to said party, they being unknown to plaintiffs, and presumably, too numerous to be brought before this Court.

6. The amount in controversy, involving a property right to a political name and title, and the right to existence as such under the said name, exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

7. The Republican Party of Mississippi, of which the petitioners are the officers and state executives, and of which they are members, and in whose behalf, as well as their own, and in behalf of all its other members similarly situated, they bring this suit, has been, since 1872, and is now a voluntary political association, lawfully organized and enjoying and exercising semi-corporate powers under the laws of the State of Mississippi; its membership is limited solely by adherence to the political principles and theories of the National Republican Party in the United States; it has, at all times since its organization in 1872 to the date of this complaint, been recognized and accepted by the National Convention of the Republican Party as its sole representative in the State of Mississippi, being the only organization whose members, delegates, committeemen and executives have been seated and recognized in the deliberations of said National Convention; as such sole user of the title of "The Republican Party of Mississippi" from 1872 to date, plaintiffs, their predecessors in office and their fellow members have acquired a proprietary right and title in the name of "The Republican Party of Mississippi"; that this name and title possesses great and immeasurable value and prestige in both state and national political affairs; that because of the long and uninterrupted use of said name and title, particularly the word "Republican" therein, and their successful maintenance of the right to the use thereof against all challenges, particularly those made

by the defendants heretofore, and the unquestioned recognition of said right by the National Convention of the Republican Party, political power, prestige and patronage have descended to and vested in the petitioners and those on whose behalf they bring this action; and that this right to the aforesaid name and title of "The Republican Party of Mississippi" as a political organization, and to the power and prestige appurtenant thereto, constitute a property right in the plaintiffs of which they cannot be divested under the provisions of the 14th Amendment to the Constitution of the United States except by due process of law; and that the acts hereinafter complained of constitute an attempt to so divest plaintiffs of such property right without such due process.

8. Plaintiffs say that the defendants and all others whom they represent and who are similarly situated, well knowing of plaintiffs' existence and long continued use of their title, attempted, in 1927, to incorporate themselves as "The Republican Party of Mississippi" and to limit membership therein to persons of their own choice; that the State of Mississippi refused to issue a corporate charter to the applicants under such name; that thereupon the defendants and their predecessors in office incorporated under the name of "The Republican Party Council of Mississippi" on or about December 5, 1927; subsequently the defendants and their predecessors began to designate themselves as "The Independent Republican Party of Mississippi"; in or about the month of November, 1948, defendants and their predecessors, acting by virtue of a claimed resolution adopted by them, asserted the right to exist and be known as the "Mississippi Republican Party"; that all of said names, styles and titles were adopted and used by defendants and their predecessors with the sole purpose and design of confusing the members of the Republican Party in Mississippi and to lead them to believe that the defendants were the real and true representatives of the National Republican Party in Mississippi; and that

at no time since their pretended organization as a political party have the defendants, their predecessors, their fellow members and officials, nor the political organization they claim to represent, been recognized or accepted by the National Convention of the Republican Party as the authorized representatives of such party.

9. On or about April 7, 1950 the plaintiffs were the officers and representatives of a state political party, heretofore referred to, and then known, as "The Republican Party of Mississippi", which party had been chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948; on said April 7, 1950 the Governor of the State of Mississippi approved an act of legislation, known as House Bill No. 912, adopted by the Legislature of the State of Mississippi, regularly convened for the legislative year of 1950, which said act, now known as Chapter 453, Laws of Mississippi, contains the following pertinent language upon which the complaint herein is founded:

"Section 1. The chairman or secretary of the state executive committee of each political party chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948, shall register the name of the political party it represents with the secretary of state within thirty (30) days after the effective date of this act. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the secretary of state by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary of state.

"Any political party hereinafter organized under the laws of this state shall register with the secretary of state in the manner as hereinafter provided and within thirty (30) days after such organization".

the directions in which the organs act. A description of them is therefore a necessary complement to an account of the Constitution and government; for it is into the hands of the parties that the working of the government has fallen."

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PERRY W. HOWARD, SR.
EDNA E. REDMOND
S. W. MILLER AND
C. T. BUTLER,

PLAINTIFFS

v.

HEBER LADNER
J. E. HOSKINS
J. A. WHITE
GEORGE L. SHELDON AND
MRS. PAUL GAMMILL,

DEFENDANTS

COMPLAINT FOR A PERMANENT INJUNCTION AGAINST THE ENFORCEMENT OF A STATE STATUTE ON THE GROUNDS OF UNCONSTITUTIONALITY, FOR A DECLARATORY JUDGMENT, AND FOR OTHER RELIEF.

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1. All parties hereto, both plaintiff and defendant, are citizens and residents of the State of Mississippi and citizens of the United States.

2. The jurisdiction of this Court is invoked under the provisions of Title 28, Sections 41 (1) (a); 2281; 2284; 2201 et seq. United States Code, this being a case involving the constitutionality of a state statute which contravenes the rights of the plaintiffs guaranteed under the Constitution of the United States.

3. Plaintiff Perry W. Howard, Sr., is the National Committeeman of the Republican Party of Mississippi; Plaintiff, Edna E. Redmond is the National Committeewoman of said Party; Plaintiff, S. W. Miller is the Chairman of the State Executive Committee of said Party; and the Plaintiff, C. T. Butler, is the Secretary of the State Executive Committee of said Party; the Republican Party of Mississippi consists of thousands of members, too numerous to enumerate here; plaintiffs therefor bring this suit in their own name as officers and members of the Republican Party of Mississippi, and as citizens of the State of Mississippi, and also on behalf of all the members of the Republican Party of Mississippi, who are similarly situated and have a common grievance against the defendants herein named and all others who subscribe to and support the acts herein complained against.

4. Defendant Heber Ladner is the duly elected and qualified Secretary of State for the State of Mississippi and is sued herein in his representative capacity as an official of the State of Mississippi charged with, and acting in, the enforcement of the statute hereinafter complained of.

5. Defendant J. E. Hoskins is the Chairman of the State Executive Committee of an organization heretofore known as the "Independent Republican Party of Mississippi; J. A. White is the Secretary of the State Executive Committee of said organization; George L. Sheldon is the National Committeeman of said organization; and Mrs. Paul B. Gammill is the National Committeewoman of said party; they, and each of them, are sued in their individual capacities, in their

official capacities as officers and representatives of the aforesaid political party, and as representatives of all other persons claiming to belong to said party, they being unknown to plaintiffs, and presumably, too numerous to be brought before this Court.

6. The amount in controversy, involving a property right to a political name and title, and the right to existence as such under the said name, exceeds in value the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

7. The Republican Party of Mississippi, of which the petitioners are the officers and state executives, and of which they are members, and in whose behalf, as well as their own, and in behalf of all its other members similarly situated, they bring this suit, has been, since 1872, and is now a voluntary political association, lawfully organized and enjoying and exercising semi-corporate powers under the laws of the State of Mississippi; its membership is limited solely by adherence to the political principles and theories of the National Republican Party in the United States; it has, at all times since its organization in 1872 to the date of this complaint, been recognized and accepted by the National Convention of the Republican Party as its sole representative in the State of Mississippi, being the only organization whose members, delegates, committeemen and executives have been seated and recognized in the deliberations of said National Convention; as such sole user of the title of "The Republican Party of Mississippi" from 1872 to date, plaintiffs, their predecessors in office and their fellow members have acquired a proprietary right and title in the name of "The Republican Party of Mississippi"; that this name and title possesses great and immeasurable value and prestige in both state and national political affairs; that because of the long and uninterrupted use of said name and title, particularly the word "Republican" therein, and their successful maintenance of the right to the use thereof against all challenges, particularly those made

by the defendants heretofore, and the unquestioned recognition of said right by the National Convention of the Republican Party, political power, prestige and patronage have descended to and vested in the petitioners and those on whose behalf they bring this action; and that this right to the aforesaid name and title of "The Republican Party of Mississippi" as a political organization, and to the power and prestige appurtenant thereto, constitute a property right in the plaintiffs of which they cannot be divested under the provisions of the 14th Amendment to the Constitution of the United States except by due process of law; and that the acts hereinafter complained of constitute an attempt to so divest plaintiffs of such property right without such due process.

8. Plaintiffs say that the defendants and all others whom they represent and who are similarly situated, well knowing of plaintiffs' existence and long continued use of their title, attempted, in 1927, to incorporate themselves as "The Republican Party of Mississippi" and to limit membership therein to persons of their own choice; that the State of Mississippi refused to issue a corporate charter to the applicants under such name; that thereupon the defendants and their predecessors in office incorporated under the name of "The Republican Party Council of Mississippi" on or about December 5, 1927; subsequently the defendants and their predecessors began to designate themselves as "The Independent Republican Party of Mississippi"; in or about the month of November, 1948, defendants and their predecessors, acting by virtue of a claimed resolution adopted by them, asserted the right to exist and be known as the "Mississippi Republican Party"; that all of said names, styles and titles were adopted and used by defendants and their predecessors with the sole purpose and design of confusing the members of the Republican Party in Mississippi and to lead them to believe that the defendants were the real and true representatives of the National Republican Party in Mississippi; and that

at no time since their pretended organization as a political party have the defendants, their predecessors, their fellow members and officials, nor the political organization they claim to represent, been recognized or accepted by the National Convention of the Republican Party as the authorized representatives of such party.

9. On or about April 7, 1950 the plaintiffs were the officers and representatives of a state political party, heretofore referred to, and then known, as "The Republican Party of Mississippi", which party had been chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948; on said April 7, 1950 the Governor of the State of Mississippi approved an act of legislation, known as House Bill No. 912, adopted by the Legislature of the State of Mississippi, regularly convened for the legislative year of 1950, which said act, now known as Chapter 453, Laws of Mississippi, contains the following pertinent language upon which the complaint herein is founded:

"Section 1. The chairman or secretary of the state executive committee of each political party chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948, shall register the name of the political party it represents with the secretary of state within thirty (30) days after the effective date of this act. Thereafter, no political party shall use or register any name or part thereof which has already been registered with the secretary of state by any other political party. No political party shall use any name in any campaign literature listing or describing its candidates which does not correspond with the name of said political party registered with the secretary of state.

"Any political party hereinafter organized under the laws of this state shall register with the secretary of state in the manner as hereinafter provided and within thirty (30) days after such organization".

As provided by Section II of said Act, it became effective immediately upon its approval, which occurred shortly after 9 o'clock A.M. on the said 7th day of April, 1950.

10. At 1:55 P.M. on the same date the defendant White, acting on behalf of the other defendants, with the exception of the defendant Ladner, filed with the defendant Ladner, as Secretary of State, an application for the registration of the "Mississippi Republican Party" under the provisions of the aforesaid act; this application, as amended on April 10, 1950, was approved and granted by the defendant Ladner on April 11, 1950. Thereafter, on April 29, 1950, being only twenty two (22) days after the adoption of the aforesaid act plaintiffs applied for registration of the "Republican Party of Mississippi", the name which they had used for more than 75 years, to the defendant Ladner; on May 13, 1950 defendant Ladner, acting in his official capacity as Secretary of State for the State of Mississippi, arbitrarily denied plaintiffs the right to register as "The Republican Party of Mississippi", assigning, as his reason therefor that under his official interpretation of the act complained of, that only the *first* party, and not *any* party, existing and chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948, was entitled to register and use the term "republican" within thirty days from the date of enactment of Chapter 453 of the Laws of Mississippi.

11. Plaintiffs say that by reason of this erroneous interpretation and application of the legislative act hereinbefore referred to by the defendant Ladner, acting as Secretary of State for the State of Mississippi, they, and each of them, and all parties on whose behalf they sue, have been deprived of their proprietary right to the use and enjoyment of the name "Republican" to designate their political affiliation; that this right to the use of the name "Republican" is one of long standing, inherent in and belonging to them since 1872; that it is a right of incalculable value; that the right to ex-

istence as the "Republican Party of Mississippi" and to the use of the term "Republican" is a property right of which the plaintiffs cannot be deprived under the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, which reads as follows:

> "nor shall any state deprive any person of life, liberty or property without due process of law.";

and that the interpretation of the act complained of herein by the defendant Ladner, and the application of such interpretation to the plaintiffs is a deliberate perversion of the legislative act and intent, and is, therefore, a denial of due process.

12. Plaintiffs further say that by reason of the misconstruction of the legislative act and intent, as written in Chapter 453, Laws of Mississippi, the defendants, Hoskins, White, Sheldon and Gammill, and each of them, as officers and individual members of the "Mississippi Republican Party", and all others associated with them and similarly situated, claim to be the sole Republican party in Mississippi, and to be the official representatives of the National Republican Party; that such representation and claim are false and known to the said defendants as such; that by reason of these false claims and misrepresentations the said defendants are being enabled to deprive the plaintiffs, and those on whose behalf they sue, of valuable property rights in the term "Republican", and of the political power and prestige associated therewith.

13. Plaintiffs further say that they are without remedy in a court of law and they have no redress save this Court exercise its jurisdiction to declare the act of the Legislature of the State of Mississippi, known as Chapter 453, Laws of Mississippi (House Bill No. 912, Acts of 1950), unconstitutional as interpreted and applied by the defendant, Ladner, Secretary of State of Mississippi, to issue its mandatory injunction

to the defendant, Heber Ladner, as Secretary of State for the State of Mississippi ordering and requiring him to register the plaintiffs and all others similarly situated as "The Republican Party of Mississippi", and to enjoin the defendants, Hoskins, White, Sheldon, Gammill, and all others claiming to be members of "The Mississippi Republican Party" from asserting or claiming that they have the sole and exclusive right to the use and enjoyment of the term "Republican" as designating their political affiliation in either state or national political affairs and elections.

WHEREFORE, THE PREMISES CONSIDERED. Plaintiffs pray:

1. That this Court convene a court of three judges to hear and determine the issues herein, as provided by Title 28, Sections 2281, 2284, U. S. C.

2. That the process of this Court may issue to the defendants, and each of them, requiring them, and each of them, to appear and answer to the exigencies of this complaint.

3. That upon the final hearing hereof the Court shall issue its judgment declaring that Chapter 453, Laws of Mississippi (House Bill 912, Acts of 1950) as applied and interpreted by the defendant, Heber Ladner, Secretary of State for the State of Mississippi, is unconstitutional, in that it deprives the plaintiffs and all other similarly situated of a property right without due process of law, contrary to the provisions of Section 1, 14th Amendment to the Constitution of the United States.

4. That the Court, at the final hearing hereon, shall issue its mandatory order of injunction, ordering and requiring the defendant, Heber Ladner, as Secretary of State for the State of Mississippi, to issue to the plaintiffs, Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler, and all other similarly situated and on whose behalf they

bring this suit, a certificate of registration, as required by the laws of the State of Mississippi, authorizing them to be and exist as a political party in the State of Mississippi under their proper name and style as "The Republican Party of Mississippi."

5. That upon the final hearing hereof the Court shall issue its order permanently enjoining the defendants, J. E. Hoskins, J. A. White, George L. Sheldon and Mrs. Paul Gammill, and all others similarly situated and who claim under them, from the sole and exclusive use of the term "Republican" in their designation of their political affiliation; and further from claiming or asserting that they are the sole "Republican" political party in the State of Mississippi and are the sole representatives of the National Republican Party in said state.

6. That plaintiffs may have their costs herein expended.

7. And for such other and further relief as may to the Court seem just and proper.

/s/ PERRY W. HOWARD, SR.

On Behalf of the Plaintiffs

DISTRICT OF COLUMBIA: SS

Perry W. Howard, Sr., being by me first duly sworn according to law, deposes and says that he is one of the plaintiffs in the foregoing and annexed complaint; that he has read the same and is familiar with the contents thereof; that the facts stated therein as of his own knowledge are true, and those stated on information and belief he believes to be true and he therefore avers them as such.

/s/ PERRY W. HOWARD, SR.

Sworn to and subscribed before me this 27 day of Jan., 1953.

/s/ DON LOCKETT YOUNG
Notary Public, D. C.

/s/ LEON A. RANSOM
1939 13th Street, N.W., Washington, D. C.
ADams 2-3700
/s/ PERRY W. HOWARD
Attorneys for the Plaintiffs

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL NO. 1974

PERRY W. HOWARD, SR.
EDNA E. REDMOND
S. W. MILLER AND
C. T. BUTLER,

PLAINTIFFS

v.

HEBER LADNER
J. E. HOSKINS
J. A. WHITE
GEORGE L. SHELDON AND
MRS. PAUL GAMMILL,

DEFENDANTS

ANSWER OF GEORGE L. SHELDON

First Defense

The complaint fails to state a claim against the Defendants upon which relief can be granted.

Third Defense

No allegation of fact contained in the complaint herein supports the conclusion alleged that the amount in controversy as to any individual party to this action exceeds $3,000, exclusive of interest and cost, and Defendant denies that there is involved the sum of $3,000 as to each Plaintiff; and

the complaint does not assert any right in any Plaintiff arising and growing out of the Constitution, laws or treaties of the United States, and Defendant denies the jurisdiction of this Court as to any and all matters in the complaint alleged. (28 U. S. C. 1331)

Fourth Defense

The complaint shows on its face that this action is not brought to prevent or to recover damages for any conspiracy to prevent an officer from performing his duty; to obstruct justice or intimidate parties, witnesses or jurors, or any of them; or to deprive any person or persons of his or their equal privileges or immunities under the laws or to prevent the deprivation of any person of equal rights under Mississippi law to make and enforce contracts, to sue, be parties, give evidence, or to the equal benefits of all laws and proceedings for the security of persons and property; or to redress or prevent the deprivation of any person of the right to inherit, purchase, lease, sell, hold and convey real and personal property; or to redress or prevent the deprivation of any privileges, rights or immunities of any person secured by the Constitution and laws of the United States. (8 U. S. C. Secs. 41, 42 and 47; 28 U. S. C. 1343.)

Fifth Defense

The complaint herein shows that this action is brought to restrain and impede the due administration of a state law by the state of its origin, and prosecution in criminal proceedings of violations thereof, and said complaint does not allege any resort to the remedies provided by state law; or any circumstance which would render said remedies inefficient, inadequate or incomplete, and does not allege any special hardship or circumstance resulting from criminal prosecution for violation of said state law not inherent in and common to any and all criminal prosecution, and said

complaint fails to state sufficient equitable grounds to warrant and justify any court of the United States in interposing its jurisdiction through its discretionary remedies of injunction and declaratory judgment.

Seventh Defense

1. Heretofore, and prior to November 3, 1950, Perry W. Howard, named in the Complaint as Perry W. Howard, Sr., claiming to be and acting as the National Committeeman of an alleged organization designated as the Republican Party in Mississippi; S. W. Miller, claiming to be Chairman of the State Executive Committee of said alleged organization; and C. T. Butler, claiming to be Secretary of the said committee; being all of the Plaintiffs mentioned and named in the Complaint herein except Edna E. Redmond; and Mary Montgomery Booze, claiming to be the National Committeewoman of said alleged organization, instituted and began their action at law, No. 12660 on the Civil Docket of the First Judicial District of Hinds County, Mississippi, for and on behalf of themselves individually, as officers as alleged, and for and on behalf of all other members, adherents, and any and all persons similarly situated having a grievance against the Defendants named in the Complaint herein and the Mississippi Republican Party; in which action Plaintiffs, along with other matters therein submitted to the jurisdiction of said Circuit Court, sought the same identical substantive relief here demanded; and said Circuit Court, acquired jurisdiction of the subject matter and the parties defendant, being all of the Defendants named in the Complaint herein, on November 3, 1950.

2. After full and complete plenary proceedings, all issues of jurisdiction and substance were resolved by said Circuit Court in favor of the Plaintiffs in said action at law; whereupon the Defendants perfected and prosecuted an appeal to

As provided by Section II of said Act, it became effective immediately upon its approval, which occurred shortly after 9 o'clock A.M. on the said 7th day of April, 1950.

10. At 1:55 P.M. on the same date the defendant White, acting on behalf of the other defendants, with the exception of the defendant Ladner, filed with the defendant Ladner, as Secretary of State, an application for the registration of the "Mississippi Republican Party" under the provisions of the aforesaid act; this application, as amended on April 10, 1950, was approved and granted by the defendant Ladner on April 11, 1950. Thereafter, on April 29, 1950, being only twenty two (22) days after the adoption of the aforesaid act plaintiffs applied for registration of the "Republican Party of Mississippi", the name which they had used for more than 75 years, to the defendant Ladner; on May 13, 1950 defendant Ladner, acting in his official capacity as Secretary of State for the State of Mississippi, arbitrarily denied plaintiffs the right to register as "The Republican Party of Mississippi", assigning, as his reason therefor that under his official interpretation of the act complained of, that only the *first* party, and not *any* party, existing and chosen as provided in Section 3107, Code of 1942, as amended by Chapter 308, Mississippi Laws of 1948, was entitled to register and use the term "republican" within thirty days from the date of enactment of Chapter 453 of the Laws of Mississippi.

11. Plaintiffs say that by reason of this erroneous interpretation and application of the legislative act hereinbefore referred to by the defendant Ladner, acting as Secretary of State for the State of Mississippi, they, and each of them, and all parties on whose behalf they sue, have been deprived of their proprietary right to the use and enjoyment of the name "Republican" to designate their political affiliation; that this right to the use of the name "Republican" is one of long standing, inherent in and belonging to them since 1872; that it is a right of incalculable value; that the right to ex-

istence as the "Republican Party of Mississippi" and to the use of the term "Republican" is a property right of which the plaintiffs cannot be deprived under the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, which reads as follows:

> "nor shall any state deprive any person of life, liberty or property without due process of law.";

and that the interpretation of the act complained of herein by the defendant Ladner, and the application of such interpretation to the plaintiffs is a deliberate perversion of the legislative act and intent, and is, therefore, a denial of due process.

12. Plaintiffs further say that by reason of the misconstruction of the legislative act and intent, as written in Chapter 453, Laws of Mississippi, the defendants, Hoskins, White, Sheldon and Gammill, and each of them, as officers and individual members of the "Mississippi Republican Party", and all others associated with them and similarly situated, claim to be the sole Republican party in Mississippi, and to be the official representatives of the National Republican Party; that such representation and claim are false and known to the said defendants as such; that by reason of these false claims and misrepresentations the said defendants are being enabled to deprive the plaintiffs, and those on whose behalf they sue, of valuable property rights in the term "Republican", and of the political power and prestige associated therewith.

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6. That plaintiffs may have their costs herein expended.

7. And for such other and further relief as may to the Court seem just and proper.

/s/ PERRY W. HOWARD, SR.

On Behalf of the Plaintiffs

DISTRICT OF COLUMBIA: SS

Perry W. Howard, Sr., being by me first duly sworn according to law, deposes and says that he is one of the plaintiffs in the foregoing and annexed complaint; that he has read the same and is familiar with the contents thereof; that the facts stated therein as of his own knowledge are true, and those stated on information and belief he believes to be true and he therefore avers them as such.

/s/ PERRY W. HOWARD, SR.

Sworn to and subscribed before me this 27 day of Jan., 1953.

/s/ DON LOCKETT YOUNG
Notary Public, D. C.

/s/ LEON A. RANSOM
1939 13th Street, N.W., Washington, D. C.
ADams 2-3700
/s/ PERRY W. HOWARD
Attorneys for the Plaintiffs

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the complaint does not assert any right in any Plaintiff arising and growing out of the Constitution, laws or treaties of the United States, and Defendant denies the jurisdiction of this Court as to any and all matters in the complaint alleged. (28 U. S. C. 1331)

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1. Heretofore, and prior to November 3, 1950, Perry W. Howard, named in the Complaint as Perry W. Howard, Sr., claiming to be and acting as the National Committeeman of an alleged organization designated as the Republican Party in Mississippi; S. W. Miller, claiming to be Chairman of the State Executive Committee of said alleged organization; and C. T. Butler, claiming to be Secretary of the said committee; being all of the Plaintiffs mentioned and named in the Complaint herein except Edna E. Redmond; and Mary Montgomery Booze, claiming to be the National Committeewoman of said alleged organization, instituted and began their action at law, No. 12660 on the Civil Docket of the First Judicial District of Hinds County, Mississippi, for and on behalf of themselves individually, as officers as alleged, and for and on behalf of all other members, adherents, and any and all persons similarly situated having a grievance against the Defendants named in the Complaint herein and the Mississippi Republican Party; in which action Plaintiffs, along with other matters therein submitted to the jurisdiction of said Circuit Court, sought the same identical substantive relief here demanded; and said Circuit Court, acquired jurisdiction of the subject matter and the parties defendant, being all of the Defendants named in the Complaint herein, on November 3, 1950.

2. After full and complete plenary proceedings, all issues of jurisdiction and substance were resolved by said Circuit Court in favor of the Plaintiffs in said action at law; whereupon the Defendants perfected and prosecuted an appeal to

the Supreme Court of Mississippi, which appeal was docketed and determined under the style of Hoskins v. Howard, No. 38,478.

3. On May 26, 1952, the Supreme Court of Mississippi rendered its opinion on said appeal, holding that said Circuit Court had committed error in its resolution of the issues presented and raised in said action at law, and that judgment should be entered in said Supreme Court, denying all claims and demands of said Plaintiff, including all substantive claims and demands set out in the Complaint in this action. (214 Miss. 481, 59 So. 2d 263.)

4. On July 17, 1952, said Supreme Court entered its judgment in accordance with said opinion; whereby, for the same claim or claims set forth in the Complaint herein, judgment was rendered in favor of all of the Defendants to this action, on the merits of said claims, and said judgment has not been modified, set aside or altered in any way; wherefore, Plaintiffs herein are barred and estopped from asserting the claims and demands set out in the Complaint herein.

5. Plaintiffs herein who were Plaintiffs in said action at law in said Circuit Court, petitioned the Supreme Court of the United States for the grant of its writ of certiorari to the Supreme Court of Mississippi, which petition was docketed as No. 420 on the docket of the November 1952 term of said Court; and in their petition showed that all of said claims and demands had been adjudicated against them, and prayed the review and reversal of the action of the Supreme Court of Mississippi for the reasons and on the grounds upon which the jurisdiction of this Court is invoked, and, although said petition was denied as not being filed in time, Plaintiffs are estopped thereby from challenging the bar and estoppal of said judgment. A copy of said petition is filed herewith as a part hereof.

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SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 1974

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EDNA E. REDMOND
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C. T. BUTLER,

PLAINTIFFS

v.

HEBER LADNER
J. E. HOSKINS
J. A. WHITE
GEORGE L. SHELDON AND
MRS. PAUL GAMMILL,

DEFENDANTS

APPEARANCES:

Messrs. J. Will Young, Joe H. Daniel and Curtis E. Coker of Young & Daniel, Deposit Guaranty Bank Building, Jackson, Mississippi.

Leon A. Ransom, 1939 Thirteenth St., N.W., Washington, D. C.

Perry W. Howard, 613 F Street, N.W., Washington, D. C.

Julian R. Dugas, 613 F. Street, N.W., Washington, D. C.
FOR THE PLAINTIFFS

Lester E. Wills, P. O. Box 566, Meridian, Mississippi.
James A. White, Durant, Mississippi.
Nelson E. Taylor, Greenwood, Mississippi.
John Stone, Assistant Attorney General, Jackson, Mississippi.

FOR DEFENDANTS

BE IT REMEMBERED that on, to-wit, Monday, August 31, 1953, This cause came on for trial before a three-judge court composed of Honorable Richard T. Rives, United States Circuit Judge, Honorable Daniel H. Thomas, United States District Judge, and Honorable Sidney C. Mize, United States District Judge, at Jackson, Mississippi, when the following proceedings were had and entered of record:

PERRY W. HOWARD, Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YOUNG:

Q. What is your home address?

A. Home address, 929 West Pearl Street, Jackson, - 1829 S. St., Washington, D. C.

Q. You are a practicing lawyer and now practicing in Washington, D. C.?

A. Yes sir.

Q. How long have you been actively at the head of the Republican Party of Mississippi?

A. Since———

MR. WILLS:

I object to that because it is leading and also calling for a conclusion of the witness, and stating a proposition that is legally impossible. I think it goes to what is the ultimate issue in this case.

THE COURT:

I will overrule the objection.

A. Since 1924; I went on the National Committee.

Q. The name of the party you were elected by at that time was what.

A. The Republican Party of Mississippi.

Q. Has the name of that party ever been changed.

A. Not to my knowledge. We have no record of it.

Q. Tell the Court whether or not each four years during that time, as required by the law of the State of Mississippi, there have been precinct, county and district meetings.

A. That is correct. We have held our Convention and our primaries in conformity with the law of the State of Mississippi and as directed on the call of the Republican National Committee.

Q. Are you familiar with the laws of the State of Mississippi. I believe Section 3107 of the Code of 1942 prescribes the method of holding precinct, county and district state conventions; or 1948?

A. Yes sir, we followed that and we complied with that rule, from the grass roots all the way to the National Convention.

Q. Now, tell the Court whether or not you have been seated at the National Republican Convention every four years since 1924?

MR. WILLS:

If the Court please, that is admitted in the pleadings.

THE COURT:

Yes, it is admitted by the pleadings; there is no controversy about that, I understand.

Q. Tell the Court whether or not your seat there has been contested every time you have appeared at the National Republican Convention?

MR. WILLS:

If the Court please, that is admitted by the pleadings.

THE COURT:

I will sustain the objection.

Q. When this Act that is now being litigated in this Court was passed by the Legislature for the State of Mississippi, you were at that time acting as National Republican Committeeman?

A. Yes sir.

MR. STONE:

The Defendant, Heber Ladner, wants to object at this time, for the purpose of the record, to any evidence introduced regarding the particular Act, on the grounds that are set forth in our motion for summary judgment. The question is res judicata, and the full faith and credit clause of the Constitution makes the State of Mississippi

JUDGE RIVES:

I am not passing on those questions. I will overrule the objection.

MR. WILLS:

We would also like to interpose an additional objection that the Defendants, by their seventh plea, have interposed the bar of estoppel in the petition of certiorari to the Supreme Court of the United States, in which they represent that the judgment of the Supreme Court was conclusive when they did determine these propositions adverse to the Plaintiffs.

JUDGE RIVES:

We are not foreclosing on that. We will carry that to the final decree. I will overrule the objection.

Q. Don't go into matters that are already admitted. When this act that is commonly known as the foot race law—

MR. WILLS:

We object and move to strike it. It has been so designated only by the Plaintiff and his followers.

JUDGE RIVES:

We sustain the objection. You are wasting a lot of time. Get down to the merits of this thing so we can see whether you have a lawsuit or not.

Q. When this law was passed did you, as National Committeeman, together with the State Committee, attempt to file with the Secretary of State, as required under that Act?

A. Yes sir.

MR. WILLS:

We submit that is a matter of record.

JUDGE RIVES:

That is admitted in the pleadings.

Q. Since that time, since you have been denied the right to file under that Act, have you attempted to ascertain what it would cost for what was originally known as the Republican Party of Mississippi to go back through the precinct, county, district and state meetings for the purpose of adopting a new name as required by that Act?

A. I have done a great deal of studying and figuring on that, Mr. Young.

Q. You have advised with your attorneys about what it would be necessary to do to comply with that Act?

A. I have.

Q. Have you caused an estimate to be made as to what it would cost the party that you represent to go through the procedure required by that Act?

A. As nearly as I could approximate it from experience, if the Court will permit, I think to create a new State Committee, to initiate an organization—we couldn't hold a meeting of the new State Committee at a cost of less than perhaps $100.00. That has been our cost through the years. We would

have to be particular about it this time more than ever. We generally put in a secretary as a full time man for about three months prior to the convention. We have never been able to get our secretary full time for less than $65.00 a week for three months, which would approximate about $900.00. We have to pay rent for headquarters. The minimum rent we have been able to get was $50.00 a month for three months, which would be $150.00. We are not able to get stenographers for less than $35.00 a week. That would be twelve weeks at $35.00 a week, and would be $420.00. Our stationery would cost us at least $50.00, and the postage would cost at least $50.00, if not $100.00. We mimeograph our calls and instructions to county committees and announcements of primaries, and we don't feel we can get those calls out and locate people properly for less than $250.00. Our telephone would run around $100.00 or more when we are getting up a new organization and have no representatives out there. The advertisement for the state call would cost $40.00 or $45.00. That is when a general call is made. In various counties, of which there are 82, we are able to get the county paper to publish the call. We have to post notices to comply with the grass roots primary. Eighty-two counties with an average of about $50.00, that would be an entire cost of $4,100.00. We have to have some transportation around in these local conventions and primaries and we put that at practically $2,000.00. County convention meeting places would average about $600.00. Getting accredited with the Republican National Committee would be $2,000.00. And if we started a new organization we would have to put organizers in the field. We would need three organizers to a district and we have six districts in the state. We would need their services for about fifteen days. With the high cost now for men who would be of any service and their expenses, it would be approximately $20.00 a day and about eighteen men—three to a district for

about fifteen days—would be about $5,000.00. If we have to start a new organization we think it would cost approximately $15,000.00 or $16,000.00.

Q. All of the activities you have enumerated were done in 1948?

A. But not at that expense, because we had our organization.

Q. You had your organization and the use of the name you have embraced all these years?

A. Yes, and the County Committees would take care of that themselves, so the pre-convention fund didn't have to be expended very heavily.

Q. It is your statement to this court that it would cost your party approximately $15,000.00?

A. I think so.

Q. If you are deprived of the name under which you have operated all these years?

A. I think so.

MR. YOUNG:

We have no further questions.

MR. WILLS:

There is one matter we would like to go into by way of cross examination, if the Court please.

CROSS EXAMINATION

BY MR. WILLS:

Q. You have stated from the witness stand that the estimate you have made of the cost of effecting an organization which would be entitled to register by the Registration Act of 1950 if it is enforced against you, would be between $15,000 and $16,000. What would the cost of perfecting your organization through to a convention in an election year be if you did not have to contend with the difficulties presented by the Registration Act of 1950; if you did not have to organize under a new name?

A. Well, Mr. Wills, that would depend upon whether or not the fight among the presidential candidates was very tense and what effort the respective candidates were making in our state to get the delegates.

Q. Do you anticipate that there is any possibility or likelihood there would be more contest than there was in 1952?

A. I don't have reference to contest among candidates. My estimate was approximated with respect to initiating a new organization from the grass roots up.

Q. What I want to establish is the difference in the cost to you and your organization if you have to build an organization from the grass roots up and if you carry on as you have carried on for the last twenty-four years.

A. To be perfectly frank with the Court, I don't think it would cost as much as initiating a new organization, even though it would be expensive if we had several candidates for the nomination.

Q. Can you give us an approximation of what it cost you in 1948?

A. We raised a pre-convention fund amounting to perhaps $5,000.00.

Q. Did you spend all of that?

A. Oh, yes.

Q. How much more money did you have to raise?

A. There were individual gifts. To be further frank with the Court, I spent some money bringing delegates up here.

Q. Confining it to the actual cost of perfecting your organization, holding your convention and getting your delegates certified to the National Convention. What was that cost?

A. I couldn't give you the exact cost; I could only approximate it.

Q. Would you say that cost, leaving out the other matters, exceeded the $5,000.00?

A. In 1948 I think was the only instance. I guess we spent anywhere from $8,000 to $10,000 in this state.

Q. Was all of that cost of organization, or was some of it campaign cost?

A. Yes, but that was not $15,000.00.

Q. I want to get you tied down to a figure.

A. I can't give you the exact figures unless we took our books and went over them, and most of it is not in the books because they don't generally record political money, as you know.

Q. Are you prepared to say it was less than $10,000?

A. As far as I know. We had some people who were quietly working here under cover for another candidate besides Senator Taft. I know they got nothing, but I couldn't tell you what they spent.

Q. You don't include that sort of expense in your $15,000?

JUDGE RIVES:

I must remind you that his figure and the figure we are concerned with is the value of the name of Republican. I don't think we should get off on what it cost the Republican Party to conduct a campaign.

MR. WILLS:

The actual value would be decided by the cost of the organization from the grass roots up and if he continues in his old name.

JUDGE RIVES:

Isn't the party already organized?

MR. WILLS:

That party cannot function without the decree of the court. The difference is what, I submit, will determine the jurisdiction of the court.

JUDGE RIVES:

I understand they have a Republican Party that they can't register, though it is already organized. Go ahead.

BY MR. WILLS: (Continuing)

Q. What is your estimate of the difference in the cost of bringing your organization into being and having it ready to certify a candidate for office of elector under the name of Republican Party in Mississippi and the cost of doing that under some other name.

A. Well, for instance, if we didn't have to initiate a new organization, this item of $5,400.00 for organization could be eliminated. Then this item of getting accredited with the Republican National Committee of $2,000.00 would be eliminated. When we have been running for eighty odd years as the same party, and organizing and initiating a new party, it is altogether different.

MR. WILLS:

I believe that answers my question.

MR. YOUNG:

That is all for us.

JUDGE MIZE:

You may stand aside.

MR. DANIEL:

If your honors please, it has been stipulated that the two volumes of the transcript of the record which occurred or took place, or is a part of the record in the proceedings in the Circuit Court of the First Judicial District of Hinds County, No. 12660, is a part of this record for all purposes, but I would like to offer specifically, in support of the Plaintiff's case here today, the following records, which are a part of this record:

We would first like to offer as a general exhibit for the Plaintiff the application of the Democratic Party of the State of Mississippi for registration under House Bill 912, being Chapter 458 of the laws of 1950, said application being dated April 7, 1950, signed by W. H. Anderson as Secretary of the Executive Committee of that party. (Page 141)

We would like to offer the application of J. A. White as Secretary of the State Executive Committee of the Mississippi Republican Party for registration of said party under the provisions of said laws being said House Bill 912, Chapter 458 of the Laws of 1950, said application being dated April 7, 1950. (Page 151)

JUDGE RIVES:

As I understand it, it is stipulated that both volumes of this record are to be considered by the Court as of record in this case.

MR. DANIEL:

Yes, your honor.

JUDGE RIVES:

It is hardly necessary to offer separate parts. You may refer to specific parts in your argument. I take it you can agree to such parts as may be pertinent.

MR. DANIEL:

These particular parts I was referring to are the parts we were particularly and principally interested in, though it is admitted that the entire record is in. I think I might clarify it by offering a certain number of pages.

MR. WILLS:

The Court will be considering the whole record.

JUDGE MIZE:

Let the record be offered as an exhibit and you can refer to such parts of it as you desire.

(Whereupon the record in Cause No. 12660, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, being in two volumes, was received in evidence and marked by the Reporter as Plaintiffs' Exhibit 1.) (This Exhibit 1 to the Plaintiffs' record is being sent up in the original form and separate from this volume.)

MR. DANIEL:

The Plaintiffs rest.

JUDGE RIVES:

Is there any evidence for the Defendants?

MR. WILLS:

If the Court please, we have nothing.

MR. STONE:

The Defendant, Heber Ladner, has nothing.

JUDGE RIVES:

I presume you are ready to argue the case. I would like to hear from you. We have read the pleadings and such briefs as you have filed. It may be that you will want to file additional briefs. If you do, we will consider any briefs you get to us before the case is decided.

MR. WILLS:

I was under the impression that the inquiry was directed solely to the issue of jurisdiction. Perhaps I should confer with my associates before I submit the case as a whole.

JUDGE RIVES:

We want to get the whole case.

MR. WILLS:

We would like to re-open the case, calling the Plaintiff, Perry W. Howard, as an adverse witness. I understand there will be no objection from counsel for Plaintiffs to that procedure, the testimony given on direct examination being directed solely to the issue of jurisdiction. We would like to offer at least two witnesses and some documentary evidence in support of our answer to the complaint as filed.

JUDGE RIVES:

All right, gentlemen. You understand to leave out any matters in connection with the counter-claim. The evidence on counter-claim is not taken at this time.

MR. WILLS:

Solely as to the issues raised by the complaint and answer.

PERRY W. HOWARD, SR., Plaintiff, called by Defendants as an adverse witness, having previously been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLS:

Q. You are the same Perry W. Howard who has previously testified on direct examination?

A. Yes sir.

Q. You are now called as an adverse witness by the Defendants?

A. Yes sir.

Q. You testified that you have been National Committeeman from Mississippi since 1924; is that correct?

A. Yes sir.

Q. Do you know who the National Committeeman was in 1920?

A. It was Mr. M. J. Mulvihill of Vicksburg.

Q. Was he still the National Committeeman in 1924 when the call for the Republican National Convention was issued?

A. Yes sir, he was.

Q. Did Mr. Mulvihill call the State Convention for the year 1924?

A. Mr. Daly, who is sitting right there, was the State Chairman and he and Mr. Mulvihill worked out the call and I was elected in 1924.

Q. Were you elected in the Convention called on the call issued to Mr. Mulvihill and promulgated by him for the Republican Party in Mississippi in the year 1924?

A. We were all the same party, but my recollection is we split up that year, had a bolt; but it was within this organization.

Q. But you split up?

A. Not the National; the faction split up.

Q. Isn't it a fact that your following walked out of the Convention that was called by Mr. Mulvihill?

MR. DANIEL:

We object on the ground that the only testimony this witness gave was that he was National Committeeman. It may have some materiality on the counter-claim, but I believe it would have no probative value on the case in chief.

JUDGE RIVES:

The Defendant has called this witness as Defendant's witness, but I don't see the pertinence of this inquiry.

MR. WILLS:

It is the contention of the Plaintiffs that this witness has been head of the organization since the memory of man runneth not to the contrary. It is our intention to show that this Plaintiff was the central point around which the dissenting group in the Republican Party in Mississippi formed, that being the name for the protection of which these plaintiffs brought this action; that he bolted the Convention called under the official call and went out and held another convention and named their own delegates and went to the National Convention contesting the delegation sent by the regu lar convention to the National Convention.

JUDGE RIVES:

That may be pertinent on the counter-claim, if we get to that.

MR. WILLS:

We tender it only as to the allegation that his is a national organization continuing down through the years, if that is considered material to the case.

JUDGE RIVES:

We will sustain the objection.

BY MR. WILLS: (Continuing)

Q. You testified that your organization held your precinct meetings, county conventions and state convention in every presidential election year from 1924 on down to date; is that correct?

A. Yes sir.

Q. Is it not a fact that in the year 1928 you and your association were under injunction from holding precinct meetings, county conventions and state convention, issued by the Chancery Court of Forrest County?

A. No sir; you folks enjoined us, and because the Supreme Court docket was two years behind you thought you could tie us out so you could get out there and get our seats, but Chief Justice Smith saw fit to try the case. We dissolved it and went to Kansas City and were seated.

Q. Is it not a fact that prior to your precinct meetings the Chancery Court of Forrest County granted an injunction against you and your association from holding your meetings; your convention?

A. I might be in error, but it is my recollection that you got your injunction afterward.

Q. After what?

A. After the primary meeting; I am not sure.

Q. Was it after the state convention or after the precinct meeting, or after the county convention?

A. I am not certain, but it was before we went to Kansas City.

Q. Was it after the precinct meeting and before the county convention, or after the county convention and before the state convention?

A. My best recollection—I am only guessing—is that it was after the convention; after the precinct meeting. That is my best recollection. I don't say that is correct. I know it was before the convention in Kansas City.

Q. The decree of the Chancery Court of Forrest County was in effect then until it was reversed, as you say, by Chief Justice Sidney Smith in the latter part of 1928?

A. No, that injunction was dissolved before we went to Kansas City.

JUDGE RIVES:

We are not concerned with what happened in 1928.

MR. WILLS:

In view of that ruling by the Court, we do not care to pursue the matter further. If the Court please, in order that we may clarify the situation, the Defendants are not in a position of admitting that these Plaintiffs would be entitled to registration, even though their registration is cancelled. What I have in mind is that they have undertaken by this action to obtain a mandatory injunction of this Court, directed to the Secretary of State to register their party and issue a certificate of registration to them. We do not concede that even if the Mississippi Republican Party had not already been registered that this party would be entitled to register.

JUDGE RIVES:

Let's don't go back twenty years ago.

BY MR. WILLS: (Continuing)

Q. Do you have the call under which you called the convention of 1948?

A. No sir.

Q. Where is that call?

MR. DANIEL:

All these matters are contained in the record, and the one thing that the Supreme Court did direct was that both parties were entitled to registration, but due to the existence of Chapter 458, the fact that these Defendants reached there first, the Plaintiffs were not permitted to register.

MR. WILLS:

That is an issue of law.

JUDGE RIVES:

We will overrule the objection.

Q. Was your call for the 1948 convention exhibited in the state trial?

A. Before Judge McGowan? I think it is.

MR. WILLS:

May I have an agreement with counsel that the copy of the call as it appears in this record may be considered without having further authentication?

JUDGE RIVES:

The entire record already has been introduced.

MR. WILLS:

I understand, but it is a separate document, independent of the court proceedings in the state. I am not asking counsel to agree to it if it is in the record. That is all.

MR. YOUNG:

We have no questions.

JUDGE RIVES:

Is there any further evidence, gentlemen?

MR. WILLS:

No further evidence, if the Court please.

JUDGE RIVES:

Is there any further evidence for the Plaintiffs?

MR. DANIEL:

No further evidence, your honor.

(Whereupon oral argument was heard by the Court.)

JUDGE RIVES:

We have tried to give each side full hearing today, but if either side has anything additional to say, it will be permitted to file briefs within the next ten days.

MR. DANIEL:

May we be permitted to extend the time to fifteen days?

JUDGE RIVES:

Very well, within the next fifteen days.

MR. WILLS:

Do I understand that the time will be limited to fifteen days?

JUDGE RIVES:

I think you had better get them in within fifteen days. We will consider anything you get to us within fifteen days, but we will not hold the case open more than fifteen days. I thank you gentlemen for a very interesting argument.

(Whereupon the hearing in this matter came to a close.)

I, Theresa Herbert, Official Court Reporter in the United States District Court, Southern District of Mississippi, hereby certify that I reported the proceedings had and done in the trial of this cause and that the preceding eighteen pages contain a full, true and correct transcript of these proceedings, as they occurred and were entered of record at Jackson, Mississippi on Monday, August 31, 1953.

This, the 1st day of December, 1953.

THERESA HERBERT

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 1974

PERRY W. HOWARD, SR.
EDNA E. REDMOND
S. W. MILLER AND
C. T. BUTLER,
PLAINTIFFS

v.

HEBER LADNER,
J. E. HOSKINS,
J. A. WHITE,
GEORGE L. SHELDON AND
MRS. PAUL GAMMILL,
DEFENDANTS

ASSIGNMENT OF ERRORS

The defendants, J. A. White, George L. Sheldon, Nelson E. Taylor and Mrs. John Hancock, file the following assignments of error to accompany their petition for appeal in the above-styled and numbered action to the Supreme Court of the United States from the judgment entered on the 26th day of October, 1953.

The Court erred:

1. In overruling and denying the motions of the defendants for summary judgment.

2. In not granting and sustaining the motions of the defandants for summary judgment.

3. In sustaining the motion of the plaintiffs to strike the counterclaims of the defendants and in ordering that the counterclaims of the defendants be stricken without further proceedings thereon.

4. In not sustaining the motion of the defendants for judgment on the pleadings on their counterclaims.

5. In ordering that a mandatory writ of injunction issue against the defendant, Heber Ladner, as Secretary of State for the State of Mississippi requiring him to register the Republican Party of Mississippi on the application of the plaintiffs in violation of that portion of Chapter 458 of the Laws of 1950 of the State of Mississippi, which provides, "Thereafter, no political party shall use or register any name or part thereof which has already been registered with the Chairman or Secretary of the State Executive Committee by any other political party."

6. In holding that the portion of Chapter 458 of the Laws of 1950 of the State of Mississippi, quoted above, is unconstitutional as applied to the application of the plaintiffs for the registration of the Republican Party in Mississippi.

7. In holding that it had jurisdiction to grant any relief upon the complaint in this action.

8. In holding that it was not bound under the doctrine of res adjudicata by the previous judgment rendered by the Supreme Court of Mississippi, which judgment had long since become final and now remains in full force and effect except insofar as the same already has been executed.

9. In construing Chapter 458 of the Laws of 1950 of the State of Mississippi contrary to the construction placed thereon by the Supreme Court of the State of Mississippi.

10. In holding that, as a Three-Judge Court, it had jurisdiction to pass the constitutional question for the decision of which it was convened, and to place its own interpretation upon the state law sought to be nullified, construing said law contrary to the construction placed thereon by the Supreme Court, and thereby to evade the constitutional question presented by the pleadings.

11. By requiring administrative action by an officer designated by a State statute to perform certain administrative acts, so that the effect of the act performed by the State officer acting pursuant to the mandate and injunction of the Court violates the provisions of the statute authorizing State action in the first instance, and perpetuates the evil which the Legislature sought to correct in the passage of the act.

12. In finding as fact, and adopting findings of fact on questions raised by affirmative allegations of the complaint and denied by specific denials in the answer where no evidence whatsoever was introduced on the issues thus made and joined.

13. In holding that the Court had jurisdiction of political matters wholly within the competence of the State.

14. In holding that it is proper for a court of equity to interpose its jurisdiction in a purely political matter where all regulative power is vested in a legislative body, where no claim is made of discrimination on account of race, color, or previous condition of servitude.

15. In holding that the Due Process Clause of the Fourteenth Amendment is a guaranty against discrimination.

16. In holding that the right to organize political parties is a privilege or immunity of citizens of the United States as such.

17. In finding for the plaintiffs.

18. In not finding for the defendants.

19. In entering judgment for plaintiffs and in not entering judgment for the defendants.

20. In assessing the cost against the defendants other than the Secretary of State, and in not assessing all costs against the plaintiffs.

WHEREFORE, Defendants pray that said judgment, order or decree be reversed and a judgment be rendered in favor of Defendants, and that Defendants have their cost of this appeal.

J. A. WHITE

NELSON E. TAYLOR and

LESTER E. WILLS

Attorneys for Defendants

By LESTER E. WILLS

BOX 566

MERIDIAN, MISSISSIPPI

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In the Supreme Court of the United States

OCTOBER TERM, 1953

NO. 501 MISC.

NELSON E. TAYLOR,
J. A. WHITE,
GEORGE L. SHELDON AND
MRS. JOHN HANCOCK,
APPELLANTS

v.

PERRY W. HOWARD, SR.,
EDNA E. REDMOND,
S. W. MILLER AND
C. T. BUTLER,
APPELLEES

MOTION TO VACATE JUDGMENT AND REMAND CAUSE TO DISTRICT COURT WITH DIRECTIONS TO DISMISS

Come Nelson E. Taylor, J. A. White, George L. Sheldon and Mrs. John Hancock, Appellants herein, and move that the judgment denominated "Order" entered in the District Court for the Southern District of Mississippi, Jackson Division, be vacated and set aside, and that the action be remanded to said court with directions to dismiss the complaint, in the alternative, for any one, and cumulatively, for all of the following reasons, to-wit:

I. The action is not one arising under the Constitution, laws or treaties of the United States, the amount or value involved does not exceed $3,000, and no controversy was presented to the District Court of which it had jurisdiction.

II. Without regard to jurisdiction, the action is one in which it is improper for a Federal Court to grant equitable relief by injunction to restrain the exercise of governmental powers by a state, the suit being by individuals who do not allege or claim any threat to or invasion of civil rights, and the allegations of property rights are insubstantial, colorable and frivolous, so that "there is no equity in the bill."

III. The issues of law presented and relied upon by Appellees as plaintiffs in the United States District Court relate to the interpretation and validity as interpreted of a statute, or of statutes and constitutional provisions, of the State of Mississippi; and all such issues had been determined finally and conclusively against the contentions of Appellees (plaintiffs below) and in favor of Appellants, in an action in the courts of the state (certiorari denied herein No. 420, November, 1952 Term) so that Appellees were precluded from relitigating, and the District Court was bound to accept the determination of, the questions decided on the prior litigation.

THE FACTS

This motion is presented for simultaneous consideration with the jurisdictional statement filed with the Transcript of the Record on this appeal. While no precedent for such simultaneous presentation, or for the summary reversal of a final judgment on appeal has been found; it is believed that the consideration of the preliminary question of jurisdiction of this Court will lead to the inevitable conclusion that the District Court did not have jurisdiction under Judicial Code Section 1331 (28 U.S.C. 1331), that no other jurisdiction was made to appear, and therefore, the only jurisdiction this

Court may exercise properly is its power to correct the error in that respect in the Court below, by vacating the judgment entered there, and remanding the cause with directions to dismiss.

It is believed further that this Court should and will exercise the power and jurisdiction vested in it, as an incident to its appellate jurisdiction, to superintend and control the proceedings in inferior courts, and, where the more elaborate and plenary proceedings are unnecessary and could not change the result in any event, this court will take appropriate action in a summary manner; without requiring the printing and presentation of a voluminous record, and the presentation of briefs and arguments on a multiplicity of points, only to determine that this court does not have jurisdiction to decide them. This motion seeks the preliminary determination of the questions presented by the grounds laid; but is not to be construed as a waiver of any point which Appellants have preserved, if this Court should hold that it has jurisdiction of the purely political affairs of a state, may go beyond the construction of statutes of a state by its own courts, and may ignore prior adjudications of the issues involved.

The facts have been stated in the Jurisdictional Statement, and reference is here made to the following portions thereof:

IV. Preliminary Statement

V. Contentions of Defendants in Trial Court

VI. Short Statement of the Case.

Pursuant to the Rules of this Court, the Opinion of the Trial Court will be printed as an appendix to the Jurisdictional Statement. As a supplement to the Jurisdictional Statement, Appellants have had printed for presentation therewith, and in support of this motion, the following documents:

Chapter 308, Mississippi Laws of 1948, Supp. p. 1

Chapter 458, Mississippi Laws of 1950, Supp. p .4

Opinion of the Supreme Court of Mississippi in Hoskins, et al. v. Howard, et al., 214 Miss. 481, 486, 59 So. 2d 263, Supp. p. 10.

Complaint, as originally filed in the court below, Supp. p. 26.

Defenses 1, 3, 4, 5 and 7 from the Answer of the Defendant, George L. Sheldon, Supp. p. 36.

The Transcript of all of the testimony heard on the trial, Supp. p. 40.

The Assignment of Errors on this Appeal, Supp. p. 58.

It is not believed that appellees can or will contend that any other portions of the record on this appeal would have any bearing upon the questions presented by this motion. Each of the grounds (I, II and III) will be made the subject of a separate article under the heading, *Propositions of Law and Citation of Authorities,* and the first section in each article will present an outline of the facts relied upon.

PROPOSITIONS OF LAW AND CITATION OF AUTHORITIES

I.

THE ACTION IS NOT ONE "ARISING UNDER" WITHIN JUDICIAL CODE SECTION 1331.

A. Jurisdictional Facts.

1. The Complaint, Supp. p. 27, par. 2, cites 28 U.S.C. 41 (1) (a) as authority for jurisdiction as an action arising under the Constitution, laws and treaties of the United States. Jurisdiction "arising under" and

"civil rights jurisdiction" is denied by the third and fourth defenses of the answer, Supp. p. 36. Subsequent pleading developed that Plaintiffs invoked jurisdiction only under Judicial Code Sec. 1331, and the reference to Sec. 41 (1) (a) was to Title 28, U. S. Code, prior to the revision of 1948.

2. The complaint alleges an erroneous and unlawful interpretation of Chapter 458, Mississippi Laws of 1950, Supp. p. 4, and thereon a wrongful refusal of the Secretary of State to register the "Republican Party in Mississippi" as a political party authorized to function as such within the state; whereby defendants (appellants) are alleged to claim the right to function as the only lawful Republican party in Mississippi, and thereupon plaintiffs (appellees) claim to be deprived of their property in the use of the name of their party.

3. On the trial, appellees introduced evidence showing that the difference in the cost of organizing a new party, or the same party under a new name; and the cost of organizing the conventions and committees under the old name, would amount to more than $3,000, Supp. p. 40. Except for the implied intent that the court should infer value from cost, no evidence of any monetary worth of the name "Republican Party in Mississippi" was presented. No other evidence tending to sustain jurisdiction was introduced. [1]

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[1] As to civil rights jurisdiction, the record is silent except for the denials thereof in the answer. Appellants invoked civil rights jurisdiction in their counterclaims, and the position taken by appellees was inconsistent with any claim on their part to jurisdiction of their claims under Judicial Code Section 1343. The only basis upon which the court below might have assumed any controversy as to civil rights, was an "off the record" colloquy at the trial in which appellees refused to either claim or renounce civil rights jurisdiction.

B. Procedure—Lower Court without Jurisdiction.

Where the District Court lacked jurisdiction to grant injunction, this court will notice the error appearing on the record on appeal, and reverse the decree and remand the action with directions to dismiss.

United States v. Corrick, 298, U. S. 435, 440, 56 S. Ct. 951, 80 L. ed 1263, 1268.

Stratton v. St. Louis Southwestern R. Co., 282 U.S. 10, 51 S. Ct. 8, 75 L. ed. 135.

Cf. *Gully v. Interstate Nat. Gas Co.*, 292 U. S. 16, 54 S. Ct. 565, 78 L. ed 1088.

United States v. Hamburg-Amerikanische Co. 239 U. S. 466, 36 S. Ct. 212, 60 L. ed 387.

C. Jurisdiction "Arising Under"

1. An action seeking only an interpretation of a state statute is not one arising under the Constitution, laws or treaties of the United States, and is not made so by an allegation or claim that it has been interpreted in such a way as to make it violative of the Constitution of the United States, where the alleged threat to constitutional protection does not involve any right, privilege or immunity secured by the laws of the United States. [2]

Louisville and N.R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L. ed 126

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[2] It may be conceded that if the proof had shown a deprivation of property of the requisite value, the deficient allegations would have been immaterial; but absent both allegations and proof, there is no power in any court of the United States to adjudicate. But in this, note that appellants were under no duty, and had no opportunity, to offer evidence or even be heard. Cf. *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163.

Cf. Gully v. First National Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. ed 70.

2. Where jurisdictional amount is dependent on value other than money, the subject matter must be measurable by some recognized pecuniary standard. [3]

First National Bank v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. ed 268.

Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. ed 1423.

3. The alleged federal question is not substantial, and does not support the claim of federal jurisdiction.

California Water Serv. Co. v. Redding, 304 U.S. 252, 58 S. Ct. 865, 82 L. ed 1323

Levering and G. Co. v. Morrin, 289 U.S. 103, 53 S. Ct. 549, 77 L. ed 1062.

Cf. *Campbell v. Chase Nat. Bank* (C.A. 2) 71 F. 2d 669, 94 A.L.R. 778, Certiorari denied, 293 U.S. 592, 55 S. Ct. 108, 79 L. ed. 686.

And see generally, Annotation: — *What Actions Arise Under Constitution, Laws and Treaties of the United States*, — 12 A.L.R. 2d 5.

II.

ACTION IS NOT ONE FOR FEDERAL EQUITY JURISDICTION

A. Statement of Facts.

1. The complaint, Supp. p. 27, alleges unconstitutionality only in that it charges that the Secretary of State has construed Chapter 458, Supp. p. 4, erron-

[3] *Wiley v. Sinkler*, 179 U.S. 58, 21 S. Ct. 17, 45 L. ed. 84, was an action for money damages, and, like *Giles v. Harris*, 189 U.S. 475, 23 S. Ct. 639, 47 L. ed. 909, was sustainable under civil rights jurisdiction.

oneously to forbid the registration of "The Republican Party in Mississippi" after the registration of "The Mississippi Republican Party." There is no allegation that the registration of "The Mississippi Republican Party" was erroneous, wrongful or fraudulent.

2. Reference to Chapter 458, Supp. p. 4, and to Chapter 308, Laws of 1948, Supp. p. 1, shows that the acts of the Secretary of State, as laid in the complaint, were performed in the orderly administration of state law; that the law was passed in the orderly regulation of the political affairs of the state; and that the law committed the determination of the political questions presented to the primary determination of the Secretary of State with authority to subpoena witnesses, Supp. p. 4-5, and hear evidence, Supp. p. 13, subject to judicial control, whereby review here would be available from appropriate state court proceedings.

3. Not only does the grant of the relief demanded require interference with the orderly administration of state government, but, in order to grant any relief at all, the federal court must nullify acts already performed, and require the performance of other acts by a state official, contrary to the declared policy of the state, and without the orderly procedure prescribed by law.

B. Procedure—Lower Court Acts Improperly in Taking Jurisdiction.

Where an inferior court improperly entertains a suit or action which should have been dismissed, this court will vacate the judgment or decree, and remand the cause to the appropriate court, with directions for further proceedings to correct the error.

United States v. Munsingwear, 340 U.S. 36, 71 S. Ct. 104, 95 L. ed. 36.

Twist v. Prairie Oil and Gas Co., 274 U.S. 684, 47 S. Ct. 755, 71 L. ed. 1297.

Cf. *St. John v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 411, 71 S. Ct. 375, 95 L. ed. 386, and *United States v. Hamburg-Amerikanische Co.*, 239 U.S. 466, 36 S. Ct. 212, 60 L. ed. 387.

C. Federal Courts—Equity Powers—Governmental Functions.

1. Federal courts may not and can not supervise and control the performance of governmental functions by a state, or compel execution of duties and obligations of states except as they arise from the Constitution itself.

Ex parte Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

New Hampshire v. Louisiana, 108 U.S. 76, 2 S. Ct. 176, 27 L. ed. 656.

Cf. *Monaco v. Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. ed. 1282, and

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 70 S. Ct. 403 ,94 L. ed. 381.

2. Federal equity jurisdiction does not extend to the political acts and affairs of a state, absent any claim of deprivation of civil rights.

Green v. Mills, (Fuller, C. J., C.A. 4), 69 Fed. 852, 30 L.R.A. 90, cited in

Giles v. Harris, 189 U.S. 475, 23 S. Ct. 639, 47 L. ed. 909.

Wood v. Broom, 287 U.S. 1, 53 S. Ct. 1, 53 S. Ct. 1, 77 L. ed. 131.

Colegrove v. Green, 328 U.S. 549, 66 S. Ct. 1198, 90 L. ed. 1432.

3. The regulation of primaries and conventions is primarily a function of the state, and such secondary control as may be exercised by the central government must originate in the Congress as its political branch.

United States v. Gradwell, 243, U.S. 476, 37 S. Ct. 407, 61 L. ed. 857.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

Minor v. Hoffersett, 21 Wall. 162, 22 L. ed. 627.

Taylor v. Beckman, 178 U.S. 548, 20 S. Ct. 870, 44 L. ed. 1187.

United States v. Reese, 92 U.S. 214, 23 L. ed. 563.

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588.

Cf. *Newberry v. United States*, 256 U.S. 232, 41 S. Ct. 469, 65 L. ed. 913.

III.

PRIOR LITIGATION CONCLUSIVE

A. Facts as to Adjudication.

1. This controversy was fully and exhaustively litigated in the state court case of *Hoskins v. Howard*, Supp. p. 10, 214 Miss. 481, 59 So. 2d 263, certiorari denied, 344 U.S. 915, 73 S. Ct. 334. Tested against the opinion in *Hoskins v .Howard*, the complaint

herein, Supp. p. 26, appears to be no more than an ill-disguised attempt to relitigate the issues there determined.

2. The cause of action, suit or claim in the state court case was to cancel the registration of the Mississippi Republican Party, and obtain the registration of the Republican Party in Mississippi. This action seeks to avoid the consequences of that adjudication by limiting the claim to registration with no demand for cancellation.

3. The state court judgment was brought to this court for review. While the petition for certiorari was denied as not being filed in time, it is significant in that appellees prolonged the litigation to the utmost, thereby preserving the temporary advantage to them in political affairs, from the judgment of the Circuit Court of Hinds County, Mississippi. Of necessity, that petition alleged that the judgment of the Supreme Court of Mississippi was final.

B. Procedure — Superintending Control — Summary Proceeding

1. 28 U.S.C.A. 2106, Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2. From *United States v. Munsingwear*, 340 U.S. 36, 71 S. Ct. 104, 95 L. ed. 36 at 340 U.S. 40:

"Our supervisory power over judgments of the lower federal courts is a broad one. See 28 U.S.C.A. Sec. 2106, June 25, 1948, 62 Stat. 869, 963, Ch. 646; United States v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466,478, 60 L. ed. 387, 392, 36 S. Ct. 212; Walling v. Reuter, 321 U.S. 671, 676,677, 88 L. ed. 1001, 1005, 1006, 64 S. Ct. 826....."

3. Although usually exercised to affirm or dismiss, this court recognizes and exercises its power to dispose of appeals on their merits by summary proceedings on motion. Rule 7, Revised Rules of the Supreme Court of the United States.

4. Where the inevitable result on appeal is made to appear by motion, and adequate safeguards against injustice are available, this court may avoid harmful delay, needless expense and prolonged consideration by an early and summary disposition on the merits.[4]

Hodges v. Snyder, 261 U.S. 600, 43 S. Ct. 435, 67 L. ed. 819.

Bodkin v. Edwards, 255 U.S. 221, 41 S. Ct. 268, 65 L. ed. 595.

Chicago R. I. and P. R. Co. v. Devine, 239 U.S. 52, 36 S. Ct. 27, 60 L. ed. 140.

Pennsylvania Co. v. Donat, 239 U.S. 50, 36 S. Ct. 4, 60 L. ed. 139.

Missouri Pac. R. Co. v. Castle, 224 U.S. 541, 32 S. Ct. 606, 56 L. ed. 875.

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[4] It is submitted that where, as here, the determination of a single issue will dispose of the appeal, and where that issue can have only one resolution, the case is one for summary disposition without regard to whether the appropriate action is affirmance, reversal or remand for further consideration pursuant to direction.

5. Under 28 U.S.C.A. 2106, this court may act summarily, and in so doing, may restrict the proceedings to a consideration of this motion and the portions of the record submitted herewith; may enter a rule to Appellees to show cause, either by citation of authorities, presentation of additional portions of the record believed by them to control, or may place the matter on the Summary Docket for argument and submission of any one or all of the propositions presented, with or without briefs; and may discontinue summary consideration at any time, without prejudice to the rights of the parties, on a finding that the court has jurisdiction of the merits, and its consideration thereof is not precluded by the prior adjudication in the State Court.

C. Prior Adjudication—Federal Question

1. The issue of res judicata is ruled by *Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. ed. 832, and the judgment brought up by this appeal must be reversed. [5]

American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98.

Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S. Ct. 600, 71 L. ed. 1069.

Cf. *Brown v. Allen*, 344 U.S. 443, 456, 457, 73 S. Ct. 397, 97 L. ed. 469,488,489.

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[5] "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."—The Federalist, LXXXII.

2. The judgment entered by the Supreme Court of Mississippi is final and conclusive under Mississippi law.

Duett v. Pine Manufacturing Co., 209 Miss. 830, 48 So. 2d 490.

Taylor v. Bell, 194 Miss. 112, 11 So. 2d 825.

Bates v. Strickland, 139 Miss. 636, 648, 103 So. 432.

See also:

State for the Use of the City of Aberdeen v. Board of Supervisors of Monroe County, 188 Miss. 636, 645, 196 So. 253.

Williams v. Patterson, 203 Miss. 865,869, 34 So. 2d 366.

CONCLUSION

Wherefore, premises considered, appellants submit this motion and themselves to the summary jurisdiction of this court for the determination of the jurisdiction of the court below, and of this court, to determine the merits of the action wherein the judgment under review was entered, upon such notices, rules and orders as the court shall direct; and without prejudice to their claims as to the merits if this court should decline to proceed summarily, or should find that it does have jurisdiction of the merits and is not precluded by prior adjudication.

Respectfully submitted,

LESTER E. WILLS
Box 566
Meridian, Mississippi

ATTORNEY FOR APPELLANTS

CERTIFICATE

I, the undersigned Lester E. Wills, attorney of record for appellants, hereby certify that I have served the above and foregoing motion and the supplement to the Jurisdictional Statement referred to therein, on the appellees by mailing copies thereof to each of the attorneys for said appellees at their addresses as shown on the pleadings in the United States District Court for the Southern District of Mississippi, this the.....day of December, 1953.

.....

LESTER E. WILLS
Box 655
Meridian, Mississippi

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JAN 13 1954

HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

J. A. WHITE, GEORGE L. SHELDON, NELSON E. TAYLOR AND MRS. JOHN HANCOCK,

Appellants,

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. MILLER AND C. T. BUTLER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE AND STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

PERRY W. HOWARD,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

J. A. White, George L. Sheldon, Nelson E. Taylor and Mrs. John Hancock,

Appellants,

vs.

Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler

---

MOTION FOR LEAVE TO FILE STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Comes Perry W. Howard, of counsel for appellees, and moves the Court for leave to file Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss or Affirm Nunc Pro Tunc, and in support of this motion, movant states:

1. That movant is an admitted member to the Bar of the United States Supreme Court, but that Messrs. Young and Daniel, Attorneys at Law, Jackson, Mississippi, are counsel for movant and his associates; that said counsel have not

yet been admitted to the Supreme Court of the United States, and because of their effort to effect arrangements in consonance with this situation, they were delayed in filing this statement.

2. That there was no intention of prolixity or delay.

PERRY W. HOWARD,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

J. A. WHITE, GEORGE L. SHELDON, NELSON E. TAYLOR AND MRS. JOHN HANCOCK,

Appellants,

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. MILLER AND C. T. BUTLER

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Come the appellees in the above entitled cause and file this, their joint statement in opposition to appellants' statement as to jurisdiction herein, and motion to dismiss or affirm, and in support thereof would respectfully show unto the Court the following:

The Appellants Are Not "Aggrieved Parties" in the Attempted Appeal

It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must have

an interest in the subject matter. That interest must be substantial and a merely nominal party to an action cannot appeal. The right invaded by a decree must be substantial and immediate, "not merely some possible, remote consequence." 4 C. J. S. Appeal and Error, Page 357.

The appellants are not "aggrieved parties" in this attempted appeal because:

(A) *No Relief Was Granted as Against the Appellants, Except the Dismissal of Their Counterclaims and Taxation With Cost*

The appellees, in their petition to the District Court for the Southern District of Mississippi, named the appellants and the Secretary of State for the State of Mississippi as parties defendant. The relief sought as shown by the petition made a part of the record herein was as follows:

> "1. That this court convene a Court of Three Judges to hear and determine the issues herein, as provided by Title 28, Section 2281, 2284, U. S. C.
>
> "2. That the process of this Court may issue to the defendants and each of them, requiring them, and each of them to appear and answer to the exigencies of this complaint.
>
> "3. That upon the final hearing hereof the Court shall issue its judgment declaring that Chapter 453, Laws of Mississippi (House Bill 912, Acts of 1950) as applied and interpreted by the defendant, Heber Ladner, Secretary of State for the State of Mississippi, is unconstitutional. . . .
>
> "4. That the Court, at the final hearing hereon, shall issue its mandatory order of injunction, ordering and requiring the defendant, Heber Ladner, as Secretary of State for the State of Mississippi, to issue to the plaintiffs, Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler, and all other similarly situated and on whose behalf they bring this suit, a certificate of registration, as required by the laws of

the State of Mississippi, authorizing them to be and exist as a political party in the State of Mississippi under their proper name and style as 'The Republican Party of Mississippi.'

"5. That upon the final hearing hereof the Court shall issue its order permanently enjoining the defendants, Nelson E. Taylor, J. A. White, George L. Sheldon, and Mrs. John Hancock, and all other similarly situated and who claim under them, from the sole and exclusive use of the term 'Republican' in their designation of their political affiliation; and further from claiming or asserting that they are the sole 'Republican' political party in the State of Mississippi and are the sole representatives of the National Republican Party in said state.

"6. That plaintiffs may have their cost herein expended."

The order entered by the District Court from which this appeal is attempted to be taken and as set forth in appellants' statement of jurisdiction reads, in its pertinent parts, as follows:

"It is further ordered that the motion of the plaintiffs to strike the counterclaim of the defendants be and it is hereby sustained and the counterclaim dismissed.

"*It is further ordered by the court that no injunction issue against any of the defendants other than the defendant Heber Ladner, Secretary of State of Mississippi.*

* * *

"It is further ordered by the court that all cost of court be taxed against the defendants other than Heber Ladner, Secretary of State."

No injunction was issued against the appellants as prayed by the appellees. They were not ordered to do anything except to pay court cost. It has long been settled that a case will be affirmed if only the matter of cost is involved

on appeal. *Glendale Elastic Fabrics Company vs. Smith*, 100 U. S. 110, 25 L. Ed. 547.

The "Mississippi Republican Party" of which the appellants are officers, was registered as a political party before the order from which this appeal is attempted to be taken was entered. It is still registered as such. The order did not make it mandatory for the Secretary of State to cancel the appellants' registration; it only made it mandatory for the Secretary of State for the State of Mississippi to register the "Republican Party of Mississippi" of which the appellees are officers. The appellants had no vested right in the exclusive registration of their party as the "Republican" party in Mississippi. Both the party of the appellees and the party of the appellants have existed side by side in Mississippi for at least twenty-five years.

The appellants have not shown that they were harmed by the order. The most that might be said is that possibly some of the members of the party of the appellees might someday become members of the party of appellants if the appellees' party ceased to exist. It is also possible that the party of appellants might be recognized by the National Republican Convention as the "Republican" party of Mississippi but it is equally possible that the party of the appellees, even under another name, might be acceptable to the National group. Any harm done the appellants must necessarily be couched in terms of "possible," "future" or "contingent" injury.

As was said in *Gange Lumber Company vs. Rowley*, 326 U. S. 295, 66 S. Ct. 125, 90 L. Ed. 85:

> ". . . The due process clause, does not assure protection from the state's regulatory powers against injuries so remote, contingent and speculative. Some substantial and more immediate harm must be shown to present a justiciable question concerning the

state's power. The injury, as it appears from this record, is neither so certain nor so substantial as to justify a finding . . ."

The Secretary of State for the State of Mississippi, being the only party whose interests were directly and immediately affected by the order entered, is the only party entitled to appeal. The appellants cannot allege error in the order against him. *Chittenden vs. Brewster,* 2 Wall. 191, 69 U. S. 191, 17 L. Ed. 839; *Hitchman Coal and Coke Company* v. *Mitchell,* 245 U. S. 229, 62 L. Ed. 260, 38 S. Ct. 190.

(B) *The Appellants Suffered No Substantial Harm by the Dismissal of Their Counterclaims*

The appellants in their counterclaims, sought an injunction against the appellees praying that the appellees be enjoined from organizing a political party to function in the State of Mississippi under the name "Republican", and from holding themselves out and pretending to be members of the National Republican Committee. The relief prayed was bottomed upon the premise that only the "Mississippi Republican Party" of which the appellants are officers, was entitled to registration.

When the Court entered its order requiring the Secretary of State for the State of Mississippi to register the "Republican Party of Mississippi" of which the appellees are officers, the whole basis for the counterclaims ceased to exist and they were properly dismissed.

As has been shown, the appellants had no vested right in the "sole" use of the term "Republican". Had the relief been granted as prayed in the counterclaims, it is purely speculative whether the National Republican Convention would recognize appellants. It is even more speculative as to whether the National group would be unwilling to recognize the appellees organized under another name. No court,

of course, could compel the National Republican Convention to take either course. *Colegrove* v. *Green*, 328 U. S. 549, 90 L. Ed. 1432, 66 S. Ct. 1198.

Even had the court refused to declare that portion of Chapter 458, Mississippi Laws of 1950, which, as construed, denied to appellees the complete use of the name of their party unconstitutional, and had it denied appellees all relief prayed for and had it found for the appellants on their counterclaims in all respects, nothing could prevent the appellees forming a new party under another name and presenting themselves to the National Republican Convention as Republicans. *Fay* v. *O'Connor*, 8 N. Y. Supp. (2d) 56, 169 Misc. 466.

It is respectfully submitted that appellants have not made a showing of substantial harm, actual or impending, to any legally protected interest which makes it necessary that this Court review the order from which this appeal is attempted to be taken; that such injury as is shown by the dismissal of appellants' counterclaims is unsubstantial, remote and speculative and too problematical to entitle the appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the order of the District Court for the Southern District of Mississippi be affirmed.

PERRY W. HOWARD,
Counsel for Appellees.

JAN 13 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 501 [redacted]

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants,

v.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. MILLER AND C. T. BUTLER,
Appellees.

Appellees' Response and Motion to Strike Appellants' Motion to Vacate Judgment and Remand Cause to District Court with Directions to Dismiss

YOUNG & DANIEL,
Counsel for Appellees.

PERRY W. HOWARD, SR.,
Of Counsel.

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In The

Supreme Court of the United States

October Term, 1953

No. 501 Misc.

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants,

v.

PERRY W. HOWARD, Sr., EDNA E. REDMOND, S. W. MILLER AND C. T. BUTLER,
Appellees.

Appellees' Response and Motion to Strike Appellants' Motion to Vacate Judgment and Remand Cause to District Court with Directions to Dismiss

Come now Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler, appellees in the above entitled cause and file this, their joint response and motion to strike appellant's motion to vacate judgment and remand cause to District Court with directions to dismiss, and in support thereof, would respectfully show unto the Court the following:

(a) That there is no authority or precedent for such a motion.

(b) That the motion of appellants goes to the merits of the cause.

(c) That the lower court lacked jurisdiction is not apparent on the face of the record.

THE FACTS

The appellants seek by motion to have this Court act summarily and vacate and remand the judgment rendered

by the Three-Judge Court below with directions to dismiss. The motion covers every question raised on appeal except the constitutionality of Chapter 458, Mississippi Laws of 1950. Thus we have the spectacle of the appellants taking an appeal, briefing their case in their jurisdictional statement, and moving the Court to determine the cause in their favor without the appellees being given an opportunity to even so much as submit briefs on the questions presented. The motion should not be entertained for the following reasons:

1. There Is No Authority or Precedent for Such a Motion.

Unquestionably this Court, or any court of appellate jurisdiction, has the right to vacate, set aside or remand any judgment or decree so as to do justice. 28 U.S.C.A., Sec. 2105. It is submitted, however, that justice can be done, and the court's appellate jurisdiction exercised only in the orderly course of judicial procedure. The appellants admit that their motion has no precedent. Rule 7, Revised Rules of the Supreme Court of the United States, makes provision for a motion by the appellees to dismiss the appeal or affirm the judgment or decree, but makes no allowance for a motion such as that submitted by appellants.

The relief the appellants seek on appeal is to have the decree entered below set aside and the cause remanded with directions to dismiss. By motion, the appellants ask this Court to grant the very relief demanded on appeal without giving the appellees an opportunity to brief or argue the questions presented. That such a procedure would serve injustice rather than justice is obvious and should not be followed.

2. A Motion to Dismiss Which Goes to the Merits Will Not Be Entertained.

Even if it should be held that the appellants can properly submit a motion to vacate the judgment and remand the cause with directions to dismiss, such a motion must

be on questions which do not go to the merits of the cause. This Court long ago held that matters res judicata and state control of a subject matter raised questions going to the merits of a cause and that a motion to dismiss or affirm would not be entertained on such grounds. *Huntington* v. *Laidley*, 176 U. S. 668, 44 L. Ed. 630, 20 S. Ct. 526; *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28, 21 S. Ct. 251, 45 L. Ed. 410. Consequently, unless this Court otherwise directs, those questions raised in the appellants' motion which go to the merits of the cause will not be discussed herein.

3. That the Lower Court Lacked Jurisdiction Is Not Apparent on the Face of the Record.

Assuming the right of appellants to file a motion to vacate and remand with directions, the only question raised and worthy of consideration is that the lower court lacked jurisdiction to consider the controversy which is apparent on the face of the record. Federal jurisdiction was invoked in the court below under the following pleadings and proceedings.

The appellees as officers and members of the Republican Party of Mississippi on behalf of themselves and all the members of said party similarly situated, filed their original complaint in the court below alleging that Chapter 458, Mississippi Laws of 1950, is unconstitutional as construed and applied, in that it deprives appellees and those similarly situated and on whose behalf the suit was brought of a valuable property right in the name "Republican" in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The complaint alleged the loss of the right by appellees to designate their political party affiliation and the political power and prestige associated therewith, and that these rights exceeded in value the sum of $3,000.00 exclusive of interest and cost.

Jurisdiction of the Federal District Court was invoked on the ground that the matter in controversy exceeded

the value of $3,000.00 and arose under the Constitution of the United States. The defendants denied that the matter in controversy exceeded in value the sum of $3,000.00 as to any one party.

At the trial, Perry W. Howard, Sr. testified that if appellees and those on whose behalf the suit was brought were denied the use of their party name the cost of replacing it by enforced reorganization would be between $15,000.00 and $16,000.00. This testimony was uncontradicted.

In a class action the test of jurisdiction in an injunction suit is the amount or value of the aggregate interest of all the members of the class on whose behalf the suit is brought. *Gibbs* v. *Buck*, 307 U. S. 66, 83 L. Ed. 1111, 59 S. Ct. 725, 30 A. L. R. (2d) 663; *Troy Bank* v. *G. A. Whitehead & Company*, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 813.

A. The Right to Organize and Continue a Political Party Under the Party Name Is a Property Right Entitled to Protection as Is Other Property.

The franchise is a valuable property right. *Ashby* v. *White*, House of Lords, 1703, 1 Bro. P. C. 47, 8 St. Tr. 89. In *Black's* Law Dictionary, the franchise is defined as "A legal right until it is recalled, and it is protected by the law as property is."

Unincorporated clubs and associations may acquire property rights in the use of a name. 4 Am. Jur. Associations and Clubs, Sec. 37; *Purcell* v. *Summers*, 126 F. (2d) 390, Cert. den. 317 U. S. 640, 87 L. Ed. 516, 63 S. Ct. 32.

The appellees have the inherent right to form and organize a political party. 29 C. J. S., Elections, Sec. 84, p. 108; and this right includes the right to exist under their party name. *Progressive Party* v. *Flynn*, 400 Ill. 102, 79 N. E. (2d) 516; and is capable of pecuniary valuations for jurisdictional purposes. *Giles* v. *Harris*, 189 U. S. 475, 47 L. Ed. 909, 23 S. Ct. 639; *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. Ed. 84, 21 S. Ct. 17; *Swafford* v. *Templeton*, 185 U. S. 487, 493, 22 S. Ct. 783.

The value of these rights, belonging to all members of the class on whose behalf the suit was brought, is the amount in controversy. *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111; *Grandin Farmers Co-op Elevator Company* v. *Langer*, 5 F. Supp. 425, Affd. 292 U. S. 605, 78 L. Ed. 1467, 54 S. Ct. 772; *Reed, Fears & Miller, Inc.* v. *Miller*, 2 F. (2d) 280.

If appellees are deprived of their right to continue under their party name and are forced to reorganize under a different one, they will not only have lost the value of the name "Republican" with all the loyalty attached thereto, but will be put to an expense of more than $15,000.00 for reorganization. *Purcell* v. *Summers, supra.* The cost of reorganization alone may be made the basis of jurisdictional amount. *Ronzio* v. *Denver I. G. W. R. Co.*, 116 F. (2d) 604.

B. The Action Is One "Arising Under" the Constitution of the United States.

The appellees filed their complaint below alleging they had been deprived of their property and rights in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As pointed out, the name of an association is a property right. The right to vote carries with it the right to vote in elections of members of Congres. *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. Ed. 84, 21 S. Ct. 17. And includes the right to organize into groups for making the right effective. *United States* v. *Classic*, 313 U. S. 298, 85 L. Ed. 1368, under a party name. *State Ex Rel McCrael* v. *Frank Phelps*,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants (Respondents),

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. BUTLER AND C. T. BUTLER,
Appellees (Petitioners)

PETITION FOR REHEARING

PERRY W. HOWARD, SR.,
Of Counsel for Petitioners.

YOUNG and DANIEL,
Counsel for Petitioners (Appellees).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 501

NELSON E. TAYLOR, J. A. WHITE, GEORGE L. SHELDON AND MRS. JOHN HANCOCK,
Appellants (Respondents),

vs.

PERRY W. HOWARD, SR., EDNA E. REDMOND, S. W. BUTLER AND C. T. BUTLER,
Appellees (Petitioners)

PETITION FOR REHEARING

Come now Perry W. Howard, Sr., Edna E. Redmond, S. W. Miller and C. T. Butler, appellees in the above entitled and numbered cause, but hereinafter referred to as petitioners, and file this their joint petition, praying that this Court will grant a rehearing of this cause and of its order entered herein on February 8, 1954, wherein the judgment of the Lower Court was vacated and this cause remanded with instructions to dismiss the complaint, and in support of said petition for rehearing would respectfully show unto the Court the following:

Points Presented and Reasons Why a Rehearing Should Be Granted

An orderly presentation of the matters urged herein in support of the petition for rehearing suggest the following order of discussion:

Point I

CHAPTER 458, GENERAL LAWS OF MISSISSIPPI, 1950, AS CONSTRUED AND APPLIED BY THE SUPREME COURT OF MISSISSIPPI, VIOLATES THE RIGHTS GUARANTEED TO PETITIONERS BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Point II

THE LOWER COURT HAD (AND THIS COURT HAS) JURISDICTION OF THE PERSONS AND OF THE SUBJECT MATTER, AND SUBSTANTIAL FEDERAL QUESTIONS WERE AND ARE PRESENTED, WHICH ARISE OUT OF THE CONSTITUTION OF THE UNITED STATES.

Point III

THE DECISION IN HOSKINS ET AL. VS. HOWARD ET AL., 214 MISS. 481, 59 SO. (2d) 263, DID NOT PRESENT THE ISSUES INVOLVED IN THIS CASE, AND THE PETITIONERS ARE NOT BARRED BY RES JUDICATA NOR ESTOPPEL.

Perhaps the most cogent reason in support of the petition for rehearing is found in the fact that the record of proceedings in the prior case, which has been urged in support of the pleas of *res judicata* and estoppel, have not yet been printed and are not yet before this Court. The orderly method of proceeding in this Court required that the record of proceedings in the Lower Court be printed and submitted to the Court on the merits of this case, and at the time of this Court's order of February 8, 1954, the record had not yet been printed and briefs had not yet been filed on the questions which were considered by the Lower Court and which should constitute the basis of decision by this Honorable Court.

The record in the prior proceeding consists of almost 400 pages and it is within said record that this Court would find the complete justification for the position of these petitioners. This entire record was before the Lower Court and would be of the utmost assistance to this Court in arriving at a fair and just decision of the case on the merits.

Due to the limited time available for the filing of this petition for rehearing under the rules of the Court, various portions of said record, which is on file in this Court but not yet printed, will be referred to. After full consideration of the entire record of proceedings in the prior case, as well as the new evidence presented, and after full consideration of complete briefs on all issues presented, the Lower Court voted unanimously to adopt the position and contentions of these petitioners and to grant them the relief which they sought.

Statement of Facts

Many of the following facts are taken from the prior proceedings, and the indulgence of this Court is requested to the extent that said facts may be considered as properly shown in the transcript of proceedings. None of these facts were available to this Court when it entered its order vacating the judgment of the Lower Court. It is submitted that these facts will be thoroughly shown to the Court in the printed record, if this petition for rehearing be granted. References will be made to the transcript of prior proceedings which, upon the granting of this petition, will be available to the Court in proper printed form for consideration on the merits of the case.

The history of the political situation as it existed in the State of Mississippi at the time of the passage of Chapter 458, General Laws of Mississippi, 1950, is of some importance to the Court. In addition to the facts alleged and shown by the general exhibits admitted in evidence by

stipulation, the Court may take judicial knowledge of the fact that the old line Democrats had met with the disfavor of the National Democratic Party because of certain difficulties which arose in the National Convention of said party in Philadelphia, Pennsylvania, in 1948. The delegates of the Democratic Party to that convention walked out of the convention during its proceedings and returned to the State of Mississippi. The cordial relations theretofore existing between the then leaders of the Democratic Party in this state and the leaders of the National Democratic Party were thoroughly severed. Thereafter, a group of citizens of the State of Mississippi who met with the favor of the National Democratic Party formed themselves into a group which used the name "Democratic" in its designation, but added thereafter the words, "affiliated with the National Democratic Party" (Tr. p. 172 *et seq.*). This group (for purpose of distinction only) will be referred to herein as the "Trumancrats". It had the blessings of the National Democratic Party and was reputed to have such influence in patronage matters in the State of Mississippi (see Job Sale Cases, *United States* v. *Hood,* 343 U. S. 148, 96 L. Ed. 846, 72 S. Ct. 658; *Hood* v. *United States,* 344 U. S. 941, 97 L. Ed. 1367, 73 S. Ct. 832; *United States* v. *Debrow,* 345 U. S. 991, 73 S. Ct. 1134, 97 L. Ed. 1399; *United States* v. *Debrow,* — U. S. —, 98 L. Ed. Adv. Sheet 78). The ability to dispense patronage or influence would carry many privileges as well as many responsibilities, and the "Trumancrats" enjoyed a substantial growth. In fact, the growth was sufficient to provide a challenge to the old-line Democratic leaders of this state (they being referred to herein as the "States Righters" for purpose of identification).

Most of the elected officials of the state were members of the "States Righters", as were the members of the legis-

lature. Governor Fielding L. Wright was then the governor of this state and was a delegate to the National Democratic Convention in Philadelphia in 1948. After the Mississippi delegates walked out of that convention, the States Right movement was born in Mississippi and other Southern states. In fact, Governor Wright became a candidate for Vice President of the United States on the "States Right" ticket and received thirty-eight electoral votes therefor. He was likewise the governor of this state on April 7, 1950, when Chapter 458, General Laws of Mississippi, 1950, was passed.

To thwart the efforts of the "Trumancrats", the legislature, with the blessing of the state administration (witness the signing of the bill by Governor Wright), passed Chapter 458, General Laws of Mississippi, 1950. It is of interest to note in passing that neither the "States Righters" nor the "Trumancrats" were interested by nor concerned with the efforts of either Republican group. The sole purpose of Chapter 458 was to cut the feet of the "Trumancrats" out from under them and to place the "States Righters" as the sole claimant to the Democratic Party label in the State of Mississippi. This fight was characterized by some heated remarks on the floor of the legislature as is evidenced by the writings of William Winter entitled "The Work of the 1950 Session of the Mississippi Legislature," *Mississippi Law Journal,* Volume XXII, page 18, which read as follows:

> "One of the most widely publicized Acts of the session was the so-called 'party supremacy act' which was passed amid rather heated remarks on both sides of the Mississippi political bench."

Further study of the political situation as it existed in this state at the time of the passage of Chapter 458 may be of some assistance to the Court. There were four active

political groups in the State of Mississippi in 1950. These groups and their activities may be briefly summarized as follows:

1. First of all, there was that group which registered fifty minutes after the Act was signed by the Governor, which is referred to as the "States Righters". The application of the "States Righters" showed that it had complied with Section 3107, Mississippi Code of 1942, as amended, and that it had been organized from the "grass roots" up and was entitled to registration under the law (Tr. pp. 145-150).

2. Secondly, there was the "Trumancrat" group which was not in existence prior to the presidential election in 1948 and which had not complied and could not comply with Section 3107, Mississippi Code of 1942, as amended (Tr. pp. 172-185). The only prior organization of this group consisted of notices given in September, 1948, by newspaper publication and by personal letters (Tr. p. 179) which were interpreted by the Attorney General as not complying with Section 3107, Mississippi Code of 1942, as amended (Tr. p. 187 *et seq.*)

3. Thirdly, there existed the "Republican Party of Mississippi" on behalf of which these petitioners filed the complaint herein as a class action. This group had been in existence for many years and had been recognized by the National Republican Committee. It had complied with Section 3107, Mississippi Code of 1942, as amended (Tr. p. 202). It was definitely entitled to register under Chapter 458, except for the fact that, as construed, it must have been first to apply in order to be entitled to use the name "Republican".

4. Fourthly, there was the group represented by the respondents herein and those whom they represent. Although this group was organized in 1928, as the "Independent Republican Party of Mississippi", it changed its name in 1948 by resolution to "Mississippi Republican Party". It alleged a compliance with Section 3107, Mississippi Code of 1942, as amended, and

it was permitted to register under the name "Mississippi Republican Party".

The Republican Party of Mississippi, the party represented by the petitioners, was organized in 1872, recognized in that year by the National Republican Convention, and has continued to be so recognized by every National Republican Convention since.

The Independent Republican Party of Mississippi, the so-called "Lily Whites", was organized in 1928 by the respondent, George L. Sheldon. At the 1948 State Convention of the Independent Republican Party of Mississippi, a resolution was adopted which provided that "from and after the presidential election of November 2, 1948, the name of the Independent Republican Party of Mississippi be and the same was Mississippi Republican Party, the successor to the Independent Republican Party of Mississippi . . ." (Tr. p. 151).

Chapter 458, General Laws of Mississippi, 1950, which is set forth in full in the supplement to the jurisdictional statement filed by the respondents herein, became effective upon approval of the Governor of the State of Mississippi at 9:00 o'clock A. M. on April 7, 1950. Fifty minutes later, on the same day, the Mississippi State Democratic Executive Committee, acting by W. H. Anderson, its Secretary, filed its application for registration of the name "Democratic" with the Secretary of State in order to comply with the provisions of Chapter 458. Ten minutes later the Secretary of State certified that he had registered the name "Democratic Party of the State of Mississippi" to said applicant. (It is important to note that this group which had thus completed its registration was that certain group generally known throughout the State of Mississippi as the "States Righters", which is the party of the vast majority of voters in this state.)

Less than five hours after the approval of Chapter 458 by the Governor, and at 1:55 P. M. on the same day, the respondents (acting by the respondent, J. A. White), applied to the Secretary of State for registration of the name "Mississippi Republican Party", and at 4:20 P. M. on April 11, 1950, the Secretary of State certified that he had then registered the name "Mississippi Republican Party" to said respondents (Tr. pp. 151-153). Subsequent to the filing of their original application at 1:55 P. M. on April 7, 1950, the respondents filed an amended application for registration at 8:35 A. M. on April 10, 1950 (Tr. pp. 154-162). On April 10, 1950, the Attorney General of the State of Mississippi advised the Secretary of State that the party represented by the respondents was entitled to registration and on the next afternoon the Secretary of State advised the respondents that the name "Mississippi Republican Party" had been registered pursuant to their petition dated April 7, 1950, and their supplemental petition dated April 10, 1950 (Tr. pp. 163-165, 166).

At 11:30 A. M. on April 8, 1950, the Mississippi Democratic Committee of the Mississippi Democratic Party (affiliated with the National Democratic Party) applied for registration of their party name (Tr. pp. 167-169). On April 10, 1950, the Secretary of State sought the advice of the Attorney General as to the right of registration of that group (Tr. pp. 170-171). The "Trumancrats" then filed an amendment to their petition for registration on April 20, 1950, at 11:20 A. M. (Tr. pp. 172-185), and on the next succeeding day the Attorney General advised the Secretary of State that the "Mississippi Democratic Party (affiliated with the National Democratic Party)" was not entitled to registration because of its failure to comply with Section 3107, Mississippi Code of 1942, as amended (Chapter 308, Laws of 1948), and because of the prior registration of the

word "Democratic" to a prior group (Tr. pp. 186-191). On April 28, 1950, the Secretary of State advised the Secretary of the "Trumancrats" that they were not entitled to registration (Tr. p. 192).

On April 29, 1950, at 11:30 A. M., the political party represented by the petitioners, which was known as the "Republican Party of Mississippi", applied for registration and showed a compliance with Section 3107, Mississippi Code of 1942, as amended (Tr. pp. 193-198). On May 2, 1950, the Attorney General of the State of Mississippi advised the Secretary of State as follows:

> "I think the petition filed herewith shows that the Party Conventions of the applicant were held in accordance of these laws, but for the fact that a prior registration of another party making similar showing had already been registered, petitioners would be entitled to registration; but under House Bill 912, two political parties cannot be registered under the same name, each claiming to be a political party whose name was registered or sought to be registered.
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> • • • • • • •
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> "You are, therefore, advised that you have no authority under House Bill 912 of the Laws of 1950 to register the petitioners in this case, and if the petitioners desire to contest the question they will be required, in my opinion, to proceed in the Circuit Court in appropriate proceedings." (Tr. p. 202).

Petitioners filed a petition with the Secretary of State to re-open the question of registration of the name "Republican Party of Mississippi" for the purpose of taking proof on the various contentions made by the petitioners and respondents in their efforts to use the name "Republican", said petition for rehearing being filed on May 5, 1950 (Tr. pp. 203-204). On May 13, 1950, the Secretary of State ad-

vised the attorneys who were then representing the petitioners that he was without authority and therefore unable to register a party known as "The Republican Party of Mississippi" (Tr. p. 214).

The petitioners, having been denied any relief by the Secretary of State, filed a suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking a writ of mandamus to compel the Secretary of State to cancel the registration of the respondents as the "Republican Party of Mississippi" and directing the Secretary to register the petitioners and their organization as the regular Republican Party of Mississippi (Tr. p. 61). The declaration was set forth in two counts, the first asserting that:

> "The plaintiffs allege that the adoption of the resolution whereby the defendants undertook to change the name of the Independent Republican Party to Mississippi Republican Party, Paragraph 10, page 8, of this declaration, is void in that there is no lawful authority whereby one party may be converted into another, and for the further reason that the organization of a party could not then be effectuated in any other way than by holding precinct elections and county and state conventions, as provided by Chapter 308 of the Laws of Mississippi of 1948 . . ."

On April 3, 1951, the plaintiffs in that cause, petitioners here, amended their pleadings so as to pray for a writ of certiorari, commanding the Secretary of State to bring up the records of his office and for an adjudication by the Circuit Court that because of error apparent on the face of the record (that the respondents had changed the name of their party by resolution) the party of the respondents was not entitled to registration (Tr. p. 83). The writ was issued as prayed (Tr. p. 138).

The defendants in that cause, respondents here, having denied that the resolution by which the name of their party

had been changed was void, two issues were tried before the Circuit Court: First, whether the respondents were entitled to registration as a result of the resolution, and, second, whether the petitioners had complied with the registration laws of Mississippi so as to be entitled to registration if the defendants were not so entitled.

The prayer for relief in the second count of the petitioners' declaration in the prior action was as follows:

> "Wherefore, the plaintiffs say that if they are not entitled to the relief prayed for in the first count of this declaration, said act of the Legislature is void and of no effect and the plaintiffs pray that the court will enter an order so declaring said act to be unconstitutional" (Tr. p. 63).

The constitutionality of the act was never passed on by the Circuit Court of Hinds County. Beginning on page 252 of the transcript, and concluding on page 261 thereof, the Court, in deciding whether the defendant party could be properly registered, having changed their name by resolution, discussed the constitutionality of the act, but only by way of reaching a decision as to whether the defendant party could be properly registered.

From page 263 of the transcript to page 282, proof was had on whether the party of the plaintiffs in that action, petitioners here, was properly qualified for registration. Thus at no point in the record did the Circuit Court of Hinds County directly consider the constitutionality of the act.

The judgment of the court is found on pages 383-385 of the transcript, the pertinent parts thereof reading as follows:

> "1. That the defendants, J. E. Hoskins, J. A. White and George L. Sheldon, did not organize as the Republican Party of Mississippi, by holding precinct, county

and state conventions, during the time prescribed by Chapter 308, Laws of 1948, and under that name, but organized as the Independent Republican Party of Mississippi and that they were, therefore, not entitled to register as the Republican Party of Mississippi.

"2. That the plaintiffs, Perry W. Howard, Mary Montgomery Booze, S. W. Miller and C. T. Butler, represent the Republican Party of Mississippi, that said party was organized by a substantial compliance with the provisions of Chapter 308 of the Laws of 1948, adopted at the regular session of the legislature of the State of Mississippi and that the plaintiffs are, therefore, entitled to registration of the party represented by them, as the Republican Party of Mississippi . . ."

At no place in the judgment rendered by the Circuit Court of Hinds County and at no place in its finding of fact and conclusions of law is the word "constitution" mentioned in any manner whatsoever. The constitutional question was pleaded in the alternative by the plaintiffs in that action, was not considered by the Circuit Court, and no decision rendered thereon by that court.

The respondents appealed from the decision of the Circuit Court and the Supreme Court of Mississippi in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, entered its judgment on May 26, 1952, reversing the court below and reinstating the registration of the party represented by the respondents and cancelled the registration of the party represented by the petitioners.

The petitioners filed their suggestion of error in the Supreme Court of Mississippi, which was overruled on July 17, 1952, and the petitioners, having exhausted all procedure for obtaining their rights in the State Court, prepared their case for appeal by certiorari to the United States Supreme Court, but through the illness of their attorney, the petition was filed too late and denied on that ground on January 5, 1953.

Point I

Chapter 458, General Laws of Mississippi, 1950, as Construed and Applied by the Supreme Court of Mississippi, Violates the Rights Guaranteed to Petitioners by the Fourteenth Amendment to the Constitution of the United States.

It is interesting to note that section 10 of Chapter 458, instead of attempting to eliminate political parties, *expresses the purpose of preserving all rights of all then existing political parties;* Section 10 of the Act provides as follows:

> "*The purpose of this Act is to provide additional remedies for the protection of the political parties of this state* and this act is not to be construed as amending or repealing any law presently existing except as is provided in Section 7 hereof . . ." (Emphasis added)

As stated above, the States Righters were in complete control of the legislature and of the principal executive offices of this state, and none of these officials were concerned about the relation of either Republican group, nor were they concerned about limiting the number of political parties. The sole purpose of Chapter 458 was to strike down the growing strength of that group of "Democrats" which were affiliated with and aided by the National Democratic Party, at a time when the "States Righters" had cast off, or had been cast off, by the National Democratic Party. It is obvious that the legislature did not intend to take away any rights of lawfully existing parties. Indeed the legislature must have enacted this law with knowledge of the constitutional ban against retrospective legislation having the obvious effect of striking down the rights of these petitioners to the non-exclusive use of the name "Republican",

which they had acquired and used over a period of many years. The express language of the Act, as shown by Section 10, would presuppose that all of the then existing and properly organized political parties were to be registered under the law. It is the interpretation and construction of this law by the Supreme Court of the State of Mississippi which has rendered the law unconstitutional, in that the acquired rights of the petitioners and those whom they represent have been denied them without due process of law and they have been denied the equal protection of the laws. It is perfectly apparent that the sole criterion established by Chapter 458, as to the right to use any particular name is that the first who comes shall be granted the right, and one who arrives simultaneously or five minutes later, shall be denied the right, and indeed, shall be subject to an injunction as well as charged with unlawful acts. Although all other statutory requirements had been met by the petitioners party, Chapter 458 (Section 6 and Section 3107-06, Mississippi Code of 1942, as amended) not only denies to the petitioners party the use of the name "Republican" but likewise makes any activities on their behalf unlawful.

A. *Political Rights, Including the Right to Organize and Perfect the Machinery of a Political Party, Are the Foundation of Democratic Government and Are Protected by the Constitution of the United States.*

The election of state and local officials, as well as the election of representatives and senators for the United States Congress are locally regulated by Sections 3105-3148, Mississippi Code of 1942, as amended. Section 3105 provides the mode of nominating state, district, county and county district officers by *primary elections.* Section 3109 provides the date of primaries; Section 3111 provides primaries for representatives in the National Congress, as well as for senators. Section 3118 provides for the names of

candidates to be submitted to the executive committee of the various political parties. Section 3119 provides for the expenses to be paid for printing ballots for the primaries said expense to be borne by the state. Section 3124 provides for the printing of the various ballots. Section 3148 provides for the election of chancellors and circuit judges at the same primary at which representatives and senators are nominated for the National Congress. It is thus apparent that the interweaving of party nomination for representatives and senators to the National Congress composes a vital part of the primary system in the State of Mississippi.

Section 2 of Article I of the Constitution of the United States secures to those qualified to vote the right to select representatives to the National Congress. It has been determined by the Supreme Court of the United States in *United States* v. *Classic*, 313 U. S. 298, 85 L. Ed. 1368, where the Court took judicial notice of the fact that in America we have "party government", and that party organization and suffrage were bound together, the Court saying:

> "We are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, Section 2. We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs

> of men, those fundamental purposes which the instrument itself disclosed. Hence, we read its words, not as we read legislative codes which are subject to continuous revisions with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

The right to vote and choose includes the right to make the choice effective. *Terry* v. *Adams,* 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152; *United States* v. *Classic, supra.*

The Seventeenth Amendment to the Constitution of the United States provides for the election of senators to the National Congress. In *Newberry* v. *United States,* 256 U. S. 263, 65 L. E. 923, 41 S. Ct. 469, the Court emphasized the importance of party primaries, saying:

> ". . . the result of the primary has been in substance to render the subsequent election merely perfunctory."

That the right to organize a political party and maintain in its name all the machinery reasonably necessary to make it effective is inseparably bound up with the right of an elector to choose his own representative can, as a practical matter, scarcely be questioned. *State* v. *Houser,* 112 Wisc. 534, 594, 100 N. W. 964, and to say that the Constitution protects the citizen only in the mechanical right to mark and cast his ballot, is to place a formality and a rigidity upon that document it was never intended to receive. *Gompers* v. *United States,* 233 U. S. 604, 610, 58 L. Ed. 115, 1120, 34 S. Ct. 693, Ann. Cas. 1915D, 1044 (1914).

In 29 *C. J. S.* 108, Section 84, it is said:

> "The people have the inherent right to form or organize and to operate political parties. This right has been held to be included in the right of sufferage, and to include, in addition, the right to organize, the right to

> have all the machinery not reasonably prohibited by law for making the organization effective . . ."

The petitioners do not challenge the right or power of the State of Mississippi to regulate political parties within its borders. They do not challenge its right to police its ballots. The question raised by the petitioners is not whether the State of Mississippi has such power, but whether the means which it employed in enacting Chapter 458, Laws of 1950, conflict with the First Amendment to the Constitution and the due process and equal protection of the law clauses of the Fourteenth Amendment. In other words, petitioners concede that the state legislature may pass such laws as will *aid* the citizens in the enjoyment of his constitutionally guaranteed rights. As was said in *State* v. *Houser, supra:*

> "The power of regulation to that end is limited only by what is reasonable. Any attempt to regulate passing that barrier is destructive of the right involved, not an aid to its enjoyment, and hence is not legitimate."

In *United States* v. *Classic,* 313 U. S. 298, 85 L. Ed. 1368, the Court held:

> ". . . Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never, determines the ultimate choice of the representative, . . ."

In *Herndon* v. *Lowry,* 57 S. Ct. 732, 301 U. S. 42, 81 L. Ed. 1066, the appellant was convicted of violating Georgia's

statute against "subversive utterances" and "subversive activities", and he contended that the statute was unconstitutional in that it deprived him of freedom of speech and freedom of assembly as protected by the Fourteenth Amendment. The evidence showed that the petitioner was an organizer for the Communist Party. The Court held:

> *"The appellant had a constitutional right to address meetings and organize parties unless in so doing he violated some prohibition of a valid statute.*
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> ". . . So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty imposed in the Fourteenth Amendment." (Emphasis added.)

It is submitted, with the utmost deference, that these petitioners have a non-exclusive right protected by the Fourteenth Amendment to the Constitution of the United States to the use of the name "Republican" and to exist as a political party (as they have done for many years), and that Chapter 458, Laws of 1950 has violently infringed upon these rights, and has actually (if the law is constitutional), caused the death of a political party existing for many years. If a state may pursue this course, then it may likewise pass a law saying that the first political party to register shall be the only one permitted to register and thereby effectively destroy the two party system in that state. Similarly, if a state may go that far, and if the rights of political parties are not protected by the Fourteenth Amendment, then a state may likewise legislate that there shall be no political parties and thereby provide for rule in an unconstitutional and undemocratic way. It is respectfully submitted that these petitioners have rights which are protected by the Fourteenth Amendment and that these

rights have been infringed upon by Chapter 458, Laws of 1950, and that said law is therefore unconstitutional.

B. *The "Foot Race" Law (Chapter 458, Laws of 1950) Violates the Rights of These Petitioners as Protected by the Fourteenth Amendment*

It is argued by the respondents that the right existing in the State of Mississippi to supervise and regulate the activities of political parties carries with it the right to designate a "first come—first served" registration, and that the state further has the right to declare that any parties not so permitted to register shall be unlawful and their activities enjoined. In advocating this particular theory, the respondents have overlooked the restrictions upon state control over political parties as announced by *Herndon* v. *Lowry, supra,* where the Court stated:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension to danger of organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the constitution."

The power to regulate and to control carries with it the requirement that such regulation and control fall within the provisions of the Fourteenth Amendment. The right to organize and effectuate the purposes of political parties is so inherent a part of the democratic government of this nation as to fall within the protection of the Fourteenth Amendment. The petitioners do not question the right of the State of Mississippi to impose reasonable regulations upon the existence of political parties and to so su-

pervise their activities as to guarantee to the qualified electors of this state the right to effectively select the governing officials of their choice. The right of regulation, supervision and control carries with it the obligation to do so in a justifiable fashion and with a valid objective in mind. Where there is regulation there must be a companion reason therefor. Where there is elimination there must be a valid public purpose to be gained. The State of Mississippi cannot, with justification, strike down the efforts of these petitioners and those in whose behalf they sue, to sponsor and vote for the candidates of their choice. They have met the requirements of Section 3107; they have been in existence for many years, and have functioned as a valid and recognized political party. Their rights are taken from them solely because they did not file with the Secretary of State prior to 1:55 P.M. on April 7, 1950. In an attempt to draft a law which would be constitutional, the legislature stated that its purpose was to protect the rights of all existing political parties, yet the interpretation and construction of the law by the Secretary of State, by the Attorney General, and by the Supreme Court, deny to the petitioners the right to register, although they applied within the thirty days provided, and although they admittedly had complied with the reasonable requirements of Section 3107. (Tr. p. 202). Upon what principle can a conclusion of valid public purpose, valid police power, or valid control and supervision be concluded in such construction and interpretation? As stated above, if the State of Mississippi is authorized under the Constitution to pass such a law, then it, or any other state, may pass a law saying that the *first* political party to register shall be the only political party, and indeed, it would probably have the right under such a construction to say that there shall be *no political parties.* If such construction would then be

legal, constitutional government shall have passed from the scene in this state and nation.

Our Courts, however, have not denied political parties a place in our constitutional government. In *Albertson* v. *Millard*, 106 F. Supp. 635 (D. C. E. D. Mich.), where a Communist Party was by law denied the right to a place on the ballot, the Court found that the party was dedicated to illegal purposes and upheld the act, but said:

> "The precise question with which we are concerned,, as was the Supreme Court in Denis vs. United States, supra, and American Communications Association vs. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925, is not, whether the state has such power, but whether the means which it employed conflict with the First and Fifth Amendments to the Constitution and the due process clause of the Fourteenth Amendment. It may be at once conceded, without the necessity of citing authority, *that the state has no power, ordinarily, to arbitrarily refuse any political party which has complied with all reasonable election laws of the state, a place on the ballot either in state or federal elections.*" (Emphasis added)

The Courts have held that before a party can be denied the right to participate in elections, a valid reason for classification must be made. In *Feinglass* v. *Reinecke*, 48 F. Supp. 438 (D. C. N. D.), the legislature passed an act which allowed nominees of the Communist Party to be deprived of a place on the ballot, without stating any valid reason for denying this class such a right. The Court in striking down the statute held:

> "If the term Communist is to be taken to mean simply a belief in a system in which goods and the instruments of production are held in common by the people, then the statute is clearly unconstitutional. . . . If a party advocating common ownership of goods and instru-

> ments of production may be barred from the ballot so may a party advocating free trade . . ."

If the construction contended for by the respondents in this case is a valid construction, a state whose governing officials are members of the Democratic Party may outlaw other parties and the Republican Party may be stricken down and held to be illegal. Conversely, if the governing officials are members of the Republican Party, then the Democratic Party may be stricken down. This result is only one step removed from the result contended for by the respondents in this case. The only possible justification for the construction contended for is on the basis that the respondents first registered and that the petitioners are, therefore, denied the right to do so. It is a first come—first served, proposition without any reasonable justification therefor and without any valid public purpose to support it.

In *Southern Railway* v. *Greene,* 216 U. S. 40, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247, the Court established the rule concerning classification which has prevailed until this day.

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

In *Cotting* v. *Kansas City Stock Yards, et al.,* 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30, a statute of Kansas defining what shall constitute public stock yards and regulating all changes thereof, was held to be in conflict with the Fourteenth Amendment for the reason that the definition of a "stock yard" was made to depend upon the volume of business done, and the facts showed that the Kansas City Stock

Yard company was the only one within the definition, and the legislation was, therefore, a denial of the requirements of the equal protection of the laws.

In *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431, the Court in considering an anti-trust statute of Illinois which exempted from its operations certain producers of agricultural products and raisers of livestock, said:

> "The difficulty is not met by saying that generally speaking a state, when enacting laws, may, in its discretion, make a classification of firms, corporations, and associations in order to subserve public purpose. For this Court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without any such basis . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this . . . *No duty rests more imperative upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the security of free government.*" (Emphasis added)

The Supreme Court of Mississippi has construed this statute as providing a justifiable public purpose in the control of political parties. The only justification given is that the first come—first served basis of classification is a valid regulation. Yet the statute itself expresses the purpose of protecting all existing political parties which are validly and properly organized. The classification and the interpretation thereof must, of necessity, (if it be constitutional) cause the death of one of the two groups using the name Republican. The selection of the one which shall thus perish is determined by the moment of arrival in the office of the Secretary of State. Had the petitioners filed an application

for registration ten minutes in advance of that filed by the respondents, the petitioners would apparently have received the right to registration. There would have then followed the death of the group represented by respondents.

The petitioners have not contended, and do not contend, that they are the sole owner of the word "Republican", nor that they are the only group of Republican adherents who are permitted to exist under state and federal law. They do contend, however, that they have an equal right to exist and to exercise their ballot in a lawful way. They have done so for many years, and the Constitution of the United States guarantees them the right to do so in the future. Valid legislation must be predicated upon these principles. The law announces no valid reason for the existence of these parties on a first come—first served basis. To do so is a most apparent violation of the Fourteenth Amendment.

The Courts in defining "due process" have expanded it beyond its literal meaning of "due procedure". Thus, Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 375, 47 S. Ct. 641, 71 L. Ed. 1095, said:

> "Despite arguments to the contrary which had seemed to me persuasive, it is settled that due process clause of the Fourteenth Amendment applies to matters of substantive law as well as matters of procedure. Thus, all fundamental rights comprised within the term 'liberty' are protected by the federal constitution from invasion by the states. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights . . . These may not be denied or abridged . . ."

When applied to substantive rights, it is now interpreted to mean that the government is without the right to deprive a person of life, liberty or property by an Act that has no reasonable relation to any proper governmental purpose, or which goes beyond the necessity of the case so as to

be an arbitrary exercise of power. *Davidson* v. *New Orleans, Louisiana*, 96 U. S. 107, 24 L. Ed. 616.

What could be more unfair, unjust, and unreasonable than a law which apparently gives parties thirty days within which to register and protect their rights, but which, in reality, is nothing more than a "foot race" law, operating on a purely "first come—first served" basis, which has no reasonable relation to the object sought to be gained.

Nothing contained in Chapter 458, Laws of 1950, indicates that it was passed to protect public welfare, nor was it designed to protect any class who, because of special circumstances, stood in special need of the exercise of the state police power. *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 159 A. L. R. 1469; *West Hotel Company* v. *Parish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703. The purpose was to protect legally organized political parties. This it did not do. It provided that lawfully existing parties should register, but by establishing no stated time within which registration could be had, made it a "foot race" as between the party represented by the petitioners and the party represented by the respondents. It is submitted that the protection of substantive rights cannot be made to rest upon so arbitrary a basis. In *Lane* v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281, Oklahoma's "grandfather clause" had been stricken down as unconstitutional. *Guinn* v. *U. S.*, 238 U. S. 347, 59 L. Ed. 1340, 35 S. Ct. 926, L. R. A. 1916A. 1124. The state legislature then passed an Act which gave citizens who had been deprived of their right to vote under the "grandfather clause" twelve days in which to register. In striking down the new Act, the Court held:

> "The practical effect of the 1916 legislation was to accord to the members of the negro race who had been discriminated against in the outlawed registration system of 1914, not more than twelve days within which to

> reassert constitutional rights which this court found in the Guinn case to have been improperly taken from them. We believe that the opportunity thus given negro voters to free themselves from the effects of discrimination to which they should never have been subjected was too cabined and confined . . ."

In that case, at least the plaintiff had twelve days in which to assert his rights, while in this case the petitioners had no definite time at all. There was no requirement in Chapter 458, Laws of 1950, that petitioners be not late, the requirement, as the Act has been interpreted and construed, was that the petitioners be not last.

In *Ochoa* v. *Hermandez Y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427, where the statute of limitations was shortened from twenty years to six years, the Court said:

> "With reference to statutes of limitation, it is well settled that they may be modified by shortening the time prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect . . ."

It is a well settled principle of constitutional law that when the legislature acts so as to deprive citizens of existing rights, the law "shall not be unreasonable, arbitrary or capricious" and that the means selected shall have a real and substantial relation to the object sought to be obtained. "It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." *Nebbis* v. *New York*, supra.

Chapter 458, Laws of 1950, as construed, fails in every way to measure up to constitutional standards: it makes an unreasonable classification; has no relation to the object

sought to be obtained; arbitrarily condemned without hearing; rendered judgment without trial. The respondents party, trapped by this unreasonable law, reached the office of the Secretary of State last and was condemned to die, not as a result of a trial after due process of law but solely because of their name.

To say that the petitioners may reorganize their party under a new name is no answer. It would not then be the same party. As has been so aptly pointed out in *State* v. *Houser*, supra, the party name under which a candidate seeks election is more important than his personal attributes. Nor is it any answer to say that so long as the petitioners and the members of the party they represent may continue to mechanically mark and cast their ballot, they have been deprived of nothing. Even in totalitarian states the citizens have the right to vote. But we Americans know that they have no political freedom because their vote cannot be made effective. That is the right these petitioners seek to protect—the right to make their vote effective by continuing their party name.

Point II.

The Lower Court Had (and This Court Has) Jurisdiction of the Persons and of the Subject Matter, and Substantial Federal Questions Were and Are Presented Which Arise under the Constitution of the United States.

The Petitioners brought this action alleging that Chapter 458, Mississippi Laws of 1948, is repugnant to the Constitution of the United States and is unconstitutional in that it denies the Petitioners rights, privileges and immunities guaranteed to them by the Constitution of the United States and its Laws, and that it takes from them property without due process of law. The action was brought on behalf of Petitioners, individually, and as officers of the Republican

Party, as members thereof, and as citizens of the State of Mississippi, and also on behalf of all the members of the Republican Party of Mississippi who are similarly situated.

Jurisdiction of the District Court was invoked under Title 28, U. S. Code, Section 1331, wherein the District Court is given original jurisdiction of all Civil Actions, "wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and arises under the Constitution, laws, or Treaties of the United States."

The Petitioners in paragraph six of their Bill, made the following allegation:

> "The amount in controversy, involving a property right to a political name and title, *and the right to exist as such under the said name,* exceeds in value the sum of three thousand ($3,000.00) dollars, exclusive of interest. . . ." (Emphasis added)

The jurisdictional amount pleaded above was denied by the respondent, George L. Sheldon, and the third defense raised in his Answer was as follows:

> "No allegation of fact contained in the Complaint herein supports the conclusion alleged that the amount in controversy as *to any individual party to this action exceeds three thousand dollars, exclusive of interest and cost, and defendant denies that there is involved the sum of three thousand dollars as to each plaintiff. . . .*" (Emphasis added)

The Courts have repeatedly held that a suit will not be dismissed on Motion or on Demurrer on the ground that the requisite jurisdictional amount is not involved if the Bill alleges that the matter in dispute exceeds in value such amount, and discloses no facts which contradict such allegations. *North American Cold Storage Company* v. *Chicago,* 151 Fed. 120 (C. C. Ill.); *Green* v. *Valley,* 101 Fed. 882 (C. C.

Ia.). As stated in *KVOS* v. *Associated Press*, 57 S. Ct. 197, 299 U. S. 269, 81 L. Ed. 183:

> " . . . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the Petitioner. No facts are pleaded which tend to show the value of that right. The Complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars ($3,000.00), and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that the jurisdiction appears on the face of the complaint. . . ."

As pointed out, the respondents have denied the jurisdictional amount to be involved as to each respondent, but stated not one single fact to substantiate the denial made. It was not claimed that the right to a party name and the right to exist under a party name were not property rights, and no reasons were set forth as to why the value of such rights does not exceed the value of exclusive of cost. Under such circumstances, the only problem raised for the Petitioners was to prove the requisite jurisdictional amount. *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 111. In other words, until the record actually revealed that the suit did not really and substantially involve the jurisdictional amount, the formal allegations contained in the Complaint were sufficient to sustain the Court's jurisdiction. *Maffett* v. *Quine*, 95 Fed. 199. The Supreme Court in *Hilton* v. *Dickinson*, 108 U. S. 165, 2 S. Ct. 424, 27 L. Ed. 668, stated the rule in the following manner:

> "It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not

the matter in dispute that sum will govern in all questions of jurisdiction . . ."

A

In a Class Action the Interest of All Members of the Class May Be Aggregated for the Purpose of Jurisdictional Amount

It should be pointed out to this Court, and would be made to appear upon a hearing on the merits, that the respondents did not deny the requisite amount was involved. The denial made was that the requisite amount was not involved as to each "Plaintiff".

The Petitioners, however, did not bring this action to protect only their individual rights. This is not a case of aggregating several individual claims for convenience. Petitioners do not seek individual judgment, but rather a judgment to protect the rights of a "class", as well as the individual Petitioners in the use and enjoyment of the name of their party. The rights Petitioners seek to protect is one they have in common with all other members of their party similarly situated, whose numbers run into the thousands. In such a situation, and in this class of action, it is unnecessary to show the jurisdictional amount in each Plaintiff, but only that the jurisdictional amount is involved.

In *Davidson 525, Order of Railway Conductors of America* v. *Gorman,* 133 Fed. (2d) 273, the rule in class actions was laid down as follows:

> ". . . All of the Plaintiffs claimed an undivided common interest in the rights which they seek to enforce. They did not ask separate judgments and it appears without dispute that the value or amount of the aggregate amounts of all these Plaintiffs exceeds $3,000.-00. Their claim is bottomed on the pleaded contract

and was asserted as an entity. We think the jurisdictional amount is involved. . . ."

In *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 56 L. Ed. 813, the Court said:

> "When two or more Plaintiffs having a separate and distinct demand, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common or undivided interest, it is enough if their interest collectively equal the jurisdictional amount . . ."

Again in *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 111, this Court said:

> "Federal jurisdiction will be adequately established, if it appears that for any member who is a party, the matter in controversy is of the value of the jurisdictional amount, or, *if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.*" (Emphasis added)

The respondents, as pointed out, have not denied the jurisdictional amount to be involved except as to each individual petitioner. As this is a class action and the jurisdictional amount does not have to appear in each petitioner, the denial of respondents was, and is, in effect, no denial at all. Any real challenge as to jurisdictional amount must, therefore, be of the Court's own motion.

B

The Right to Vote, Organize Political Parties, and Continue to Act Under the Party Name Is a Property Right Entitled to Protection As Other Property

It is the contention of the Petitioners that they, and the party and class they represent, have a property right in

the name "Republican" of which they have been divested without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

There can be no question but that the franchise is a valuable property right. *Ashby* v. *White*, House of Lords, 1703, *1 Bro.* P. C. 47, 8 St. 89. In *Black's* Law Dictionary, the franchise is defined as "a legal right until it is recalled, and *it is protected by the law as property is*". (Emphasis added)

In 29 C.J.S., pg. 108, Section 84, we find the following:

> "The people have the inherent right to form or organize political parties. This right has been held to be included in the right of suffrage."

And includes "the right to organize the right to have all the machinery not reasonably prohibited by law for making the organization effective as regards the declaration of policies and election of officers in harmony therewith." See also *State ex rel, Kern* v. *Damnann*, 245 N. W. 759, 216 Wisc. 394.

By being last, as opposed to late, in applying for registration of their party with the Secretary of State, the Petitioners and the thousands on whose behalf this suit was brought were deprived of their party name. As stated in the authorities above, they were then deprived of the thing they had the inherent right to enjoy. Without their party name they, as a party, and as individuals, are rendered at once impotent in their attempts to give effective expression to their political policies and convictions.

In *State* v. *Houser*, 112 Wisc. 534, 594, 100 N.W. 964, the question of which of two rival Republican Parties would appear on the ballot was before the Court. The Court there discussed the value of a party name at length, saying:

> "That the question of which of two rival state tickets shall appear on the official ballot as the regular ticket

of a great political party is a question publici juris, I cannot doubt. That the decision of this question materially effects the liberty of the people and involves the general interest of the State at large, I can have little doubt. It is easy to say that so long as the names appear at some place on the ballot, that the voter may designate them, if he chooses, every reasonable requirement is satisfied . . . We live in the days of party government. Whether it be desirable or not we cannot escape it if we would. All the recent laws providing for official ballot and recognizing conventions and caucuses as quasi governmental agencies have, in my judgment, made the party organization and the party name more powerful than ever. . . . We all know that if the name of John Doe goes on the official ballot in the column headed by the name of the dominant party he will, in all reasonable probability, be elected, while if it is put in another column it is equally probable that he will be defeated; not because of any difference in his intellectual, mental, or moral qualities, but simply because of the weight and influence of the party name and its influence on the voters. . . .

"In view of these well understood conditions, the right to use of the party name cannot be reasonably called a trivial right, nor the question who is entitled to its use an unimportant question."

If the right to vote carries with it the right to vote for Congressman and Representatives, *United States* v. *Classic*, 313 U. S. 298, 85 L. Ed. 1368; *Newberry* v. *U. S.*, 256 U. S. 263, 65 L. Ed. 923, 41 S. Ct. 469, it carries with it the right to vote under a party name. *Progressive Party* v. *Flynn*, 400 Ill. 102, 79 N.E. (2d) 516. The right to vote under a party name carries with it the right to have that name free of unreasonable and arbitrary laws. *Southern Railway* v. *Greene*, 216 U. S. 400, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *State* v. *Houser*, supra; *Albertson* v. *Millard*, 106 F. Supp. 634, (D. C. ED, Mich.); *Feinglass*

v. *Reinecke*, 48 F. Supp. 438 (D. C. N. D.); *Lane* v. *Wilson*, 300 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281.

The Petitioners have alleged that they have property rights in the name "Republican" and that they have been deprived of these rights in a manner which violates the due process clause of the Fourteenth Amendment. That they might be wrong does not affect jurisdiction. They have been deprived of a right enjoyed for many years. It effects their very fundamental liberties and years of labor spent in an effort to make their votes effective to express their political philosophies. They have based their actions squarely on constitutional grounds; that is the sole basis of their suit.

As was said in *Bell* v. *Hood*, 66 S. Ct. 773, 327 U. S. 678, 90 L. Ed. 939:

> ". . . Respondents maintain that Petitioners could not recover under the Constitution or Laws of the United States, since the Constitution does not expressly provide for recovery for money damages or violations of the Fourth and Fifth Amendments and Congress has enacted a statute that does so provide. . . .
>
> "Whether or not the complaint as drafted states a common-law action in trespass, made actionable by state law, it is clear from the way that it was drawn that Petitioners seek recovery squarely on the grounds that the respondent violated the Fourth and Fifth Amendments . . .
>
> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action upon which Petitioners could actually recover. . . . The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or Federal Statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such

a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra . . ."

Again in *Cuyahoga Power Co.* v. *Akron*, 240 U.S. 462, 60 L. Ed. 743, 26 S. Ct. 407, this Court said:

". . . Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case. . . ."

And in *Mosher* v. *Phoenix*, 287 U.S. 29, 53 S. Ct. 67, 77 L. Ed. 148, Petitioner brought suit alleging that the City was appropriating her property without compensation and without due process of law. The District Court dismissed for want of jurisdiction and the Circuit Court of Appeals affirmed. This Court in reserving the said case held:

"We are of the opinion that the allegations of the Bill of Complaint that the City, acting under color of State authority, was violating the asserted private right secured by the federal constitution and presented a substantial federal question and that it was error for the district court to refuse jurisdiction."

C

The Respondents Have Shown the Requisite Jurisdictional Amount to Be Involved

It has long been settled that the rights involved and the right to vote are capable of a monetary valuation. Thus, in *Wiley* v. *Sinkler*, 179 U.S. 58, 45 L. Ed. 84, 21 S. Ct. 17, an action was brought by the plaintiff against the Board of Managers of a general election in which he alleged that he was a qualified elector; had been denied the right to vote, and sought damages for $2,500.00. A demurrer was inter-

posed, the first ground being that the court had no jurisdiction. Of this this court on appeal said:

> "The damages are laid at the sum of $2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. . . ."

It is true that the Petitioners have not asked for damages, but they do seek protection from the unlawful invasion of their rights which greatly exceeds in value the jurisdictional amount. In a suit for an injunction it is the value of the rights sought to be protected that determines the court's jurisdiction.

In *Grandin Farmer's Coop. Elevator Company* v. *Langer*, 5 F. Supp. 425, affirmed 292 U.S. 605, 78 L. Ed. 1467, 54 S. Ct. 772, the Governor of North Dakota placed an embargo on the shipment of grain out of the State, pursuant to a statute. The plaintiffs brought their action alleging the act to be unconstitutional and the question of jurisdictional amount was raised by the defendants. The court denied the validity of the defendants' plea and issued the injunction, saying:

> "The defendants contend that it does not appear that a sufficient amount is involved to give this court jurisdiction, and assert that the complainants have an adequate remedy at law, and, moreover, that the legislative act and the executive proclamations constitute no more than a lawful exercise of the police power of the state in view of the existing economic conditions.
>
> "The bill asserts the action involves more than $3,000.00 exclusive of interest and cost. It is obvious that what the complainants seek to protect is the right to operate their elevators and to conduct their business

free of the restrictions complained of. *The value of that right is the amount in controversy.* (Emphasis added)

"Complainants set up a right to maintain and operate its plant and conduct its business free from wrongful interference by Defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it had such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction". Glenwood Light & Water Co., v. Mutual Light & Power Co., 239 U.S. 121, 126, 36 S. Ct. 30, 32, 60 L. Ed. 174. . . .

"To justify a dismissal where the jurisdictional amount is in question, absence of jurisdiction must be shown to a legal certainty. . . ."

It must be kept in mind that this is a class action; that the rights of thousands of members of petitioner's party are involved, and that respondents have not denied the jurisdictional amount to be involved except as to each petitioner, individually. There is nothing in the record to show that the aggregate rights of the class does not exceed the jurisdictional amounts as alleged. These rights are capable of monetary valuation, *Wiley* v. *Sinkler, supra,* and are rights which should be protected by injunction.

In *Giles* v. *Holmes,* 189 U.S. 475, 47 L. Ed. 909, 23 S. Ct. 639, the plaintiff appealed from the Circuit Court of the United States for the Middle District of Alabama to review a decree, which dismissed for want of jurisdiction, a bill in equity to compel the Board of Registrars to enroll a negro on the voting lists. The Alabama Constitution provided qualifications for those registered prior to 1903, and a different set of qualifications involving more severe tests for those registering after 1903. The principal object of the plaintiff's bill was to obtain the permanent advantages of

registration as of a date of 1903. Of the question of jurisdictional amount this Court said:

> ". . . But it is suggested that the Circuit Court was right in its ruling that it had no jurisdiction as a court of the United States, because the bill did not aver threatened damage to an amount exceeding $2,000. . . . We have recognized too, that the deprivation of a man's political and social right properly may be alleged to involve damage to that amount, capable of estimation in money. Wiley v. Sinkler, 179 U.S. 58, 45 L. Ed. 84, 21 S. Ct. 17; Swafford v. Templeton, 185 U.S. 487, 46 L. Ed. 1005, 22 S. Ct. 783. . . ."

In *State, ex rel. McGrael* v. *Phelps*, 144 Wisc. 1, 128 N. W. 1041, the court said:

> ". . . The right of suffrage includes the right of voters to separate into groups according to their political beliefs respecting governmental policies, and the right of every group to organize and have all the machinery in that regard not reasonably prohibited by law for making the organization effective as regards the declaring of its members, and vitalizing its policies by electing officers in harmony therewith to legislate and execute laws to that end. . . ."

The right to separate into a political group for the purpose of making their votes effective was exercised by the party represented here by petitioners in 1872. They organized under the name "Mississippi Republican Party". It is only through use of the party name that its adherents, petitioners and those similarly situated, can hope to have an effective voice in the policies and legislation of their representatives in government. The right to a party name is so closely knitted with the right to vote that to speak of one without the other is, as a practical matter, to talk nonsense. When Chapter 458, Laws of 1950, as construed, robbed the members of petitioners' party, and the petitioners of their

party name, it robbed them of an effective vote in the affairs of government as surely as if it denied them, individually, of the right to cast their ballot. That right, this court has said, is capable of monetary valuation, and, it is submitted, that valuation of the rights of this large group represented by petitioners far exceeds the jurisdictional amount. The respondents have not denied it.

Petitioners, however, went further than the mere allegation of jurisdictional amount. They proved without contradiction, that in order to exercise their right to organize, which no one denies them, they would, if deprived of their present name, be forced to expend $15,000.00 to $16,000.00. This organization they now have; this the law in question would deprive them of. The expense of reorganization would be borne by petitioners and the members on whose behalf they sued, and exceeds, many times, the jurisdictional amount. *Ronzio* v. *Denver I.G.W.R. Co.*, 116 F. (2d) 604.

A name, because of its association, background, and the loyalties attaching thereto, may, of itself, involve more than the jurisdictional amount, even to a non-profit organization such as a church. *Purcell* v. *Summers*, 126 F. (2d) 390, Cert. Den. 317 U.S. 640, 87 L. Ed. 516, 63 S. Ct. 32. Certainly, where, as here, the name is that of a political party, involving the right to vote, not only in state elections, but for Congressmen and Senators as well, its value is incalculable. Note, too, that even if the party reorganizes under another name, the petitioners are not in *status quo* even though they have expended $15,000.00 to $16,000.00. They have still been deprived of the important thing—the name itself.

Petitioners believe that upon a hearing on the merits the court will agree that substantial federal questions are pre-

sented and that the district court had, and this court has, jurisdiction of the parties and of the subject matter.

Point III

The Decision in Hoskins et al. vs. Howard et al., 214 Miss. 481, 59 So. (2d) 263, Did Not Present the Issues Involved in This Case and the Petitioners Are Not Barred by Res Judicata Nor Estoppel.

The first serious question raised below, and here, is whether the decision of the Supreme Court of Mississippi in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, Cert. Den., 344 U.S. 915, 97 L. Ed. 705, prevents the Federal District Court, and this Court, assuming jurisdiction under the Doctrine of *Res Judicata*. Of course the question of *res judicata* goes to the merits of the case and a motion to deal summarily therewith on such grounds will not ordinarily be entertained. *Huntington* v. *Laidley*, 176 U.S. 668, 44 L. Ed. 630, 20 S. Ct. 526; *Ill. Central R. Co.* v. *Adams*, 180 U. S. 28, 45 L. Ed. 410, 21 S. Ct. 251. Certainly such a motion should not have been considered in this case as the doctrine of *res judicata* does not, in fact or in law, apply.

The Circuit Court of Hinds County in deciding the issue of whether the party of the respondents was entitled to registration, having changed their name by resolution, discussed the constitutional aspects of Chapter 458, but only by way of construing it to determine the question at issue, namely whether the respondents were entitled to register. The Circuit Court held the respondents were not entitled to register, and, upon proof made, the petitioners were.

A. *Neither Party Could Appeal the Constitutional Question to the Supreme Court of Mississippi*

The defendants in *Hoskins* v. *Howard, supra*, respondents here, were not attacking the constitutionality of the Act

and could not raise the issue on appeal, the lower court having found it unnecessary to make a ruling thereon. The plaintiffs, petitioners here, having obtained all of the relief prayed for in the first count of their declaration, could not, under the rules of procedure in Mississippi, raise the question as appellees; they were not entitled to file any assignments of error. As is pointed out in 4 C. J. S., Sec. 183, p. 353:

> "Under statutes expressly or by necessary implication restricting the right of appeal to persons or parties aggrieved, or from decisions affecting a substantial right of appellant, to maintain appeal or writ of error in the person or party seeking review must not only be interested in the subject matter of the suit, but must also be injuriously affected or aggrieved by the judgment, order or decree complained of . . ."

The rule is followed in Mississippi. In *Davis et al* v. *Shemper*, 210 Miss. 201, 49 So. (2d) 253, the plaintiff moved to strike the answer of one of the parties, Mrs. Davis, denying personal liability. She obtained a favorable judgment on that issue, but assigned error. The Court on appeal said:

> "Technically, plaintiff should have taken a nonsuit as to Mrs. Davis on that issue instead of moving to strike her answer. However, the question is foreclosed here for these reasons: First, as a part of the oral motion to strike, counsel for plaintiff stated he was then abandoning any contention that Mrs. Davis was personally liable, and in a number of places in the record the court and counsel for both sides spoke of that action by plaintiff as a dismissal of any claim for personal liability against her; and, second, personal judgment was rendered in her favor, and, as to personal liability, there is nothing from which she can appeal. She won that contest."

The Supreme Court of Mississippi, in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, clearly stated that the lower court had entered its order on the single ground that the respondents had changed their name and disqualified themselves from registering, as the following quotation shows:

> "The records show affirmatively that the organization represented by the appellants has been duly organized by precinct meetings, county conventions and state conventions. This does not seem to be seriously questioned by appellees. The learned trial court, however, found error of law upon the face of the record for the reason that the organization represented by appellants changed its name after the happening of the events required to be performed in 1948, *and upon this sole ground entered the order from which this appeal is prosecuted.*" (Emphasis added.)

Although the Supreme Court of Mississippi then discussed the constitutionality of the act, it was not mentioned in its order, which reads as follows:

> ". . . The judgment of the lower court will be reversed and a judgment will be here entered reinstating the registration of Mississippi Republican Party and cancelling the registration of Republican Party of Mississippi as ordered by the lower court.
>
> "Reversed and judgment here."

As the judgment of the Circuit Court of Hinds County was rendered on the "sole" ground that the organization represented by the appellants changed its name after the happening of the events required to be performed in 1948; as neither party to the action could raise the constitutionality of the act on appeal, and as a finding by the Supreme Court that the lower court erred in its "sole" finding would be sufficient to reverse the case, it would be necessary to charge the Supreme Court of Mississippi with

a violation of all known rules of law to hold that it decided and foreclosed the Constitutional Question. If it did decide the question when it was not properly before it, such a decision is advisory merely and the appellees here were not judicially estopped or bound by *res judicata* thereby. The following rules support these contentions:

B. *Constitutional Questions Will Not Be Decided Where Other Decisive Questions Are Raised*

As has been pointed out, the decision of the Circuit Court of Hinds County rested upon one issue only. The Supreme Court of Mississippi has often held that where a case can be resolved on a decisive point other than the constitutional question involved a decision of that question cannot properly be made.

In *Adams, State Revenue Agent* v. *Capitol State Bank*, 74 Miss. 307, 20 So. 881, the Court said:

> "We are asked by counsel on both sides to consider and decide the constitutional question which was argued before us. While the court would be pleased to comply with the request, yet we are constrained by our sense of duty to deny it . . . While the obligation rests upon the courts to fearlessly see that the constitution is preserved, still wisdom requires that they should proceed in such matters cautiously; and we think an act of the legislature should never be held to be violative of the fundamental laws unless the right of a litigant in the particular case before the court requires it to be done . . . It is both more proper and more respectful to coordinate department to discuss constitutional questions only when this is the very *lis mota. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled.* In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, *if the record also presents*

some other clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable . . ." (Emphasis added)

The Supreme Court of Mississippi has consistently adhered to that principle. *Hendricks* v. *State,* 79 Miss. 368, 30 So. 708; *Maxey* v. *State,* 140 Miss. 570, 106 So. 353; *Hallum* v. *Mobile and Ohio Railroad Company,* — Miss. —, 24 So. 909; *Native Lumber Company* v. *Board of Supervisors,* 89 Miss. 171, 42 So. 665; *Dart* v. *City of Gulfport,* 147 Miss. 534, 113 So. 441; *Dunn* v. *Love,* 155 So. 331, 172 Misc. 342, 92 A. L. R. 1323; *Jackson County* v. *Worth,* 127 Miss. 814, 90 So. 588; *Nashville* v. *Adams County,* 123 Miss. 413, 86 So. 261.

The same rule obtains in the Federal Courts. *Blair* v. *United States,* 250 U. S. 273, 63 L. Ed. 979, 39 S. Ct. 468; *Risty* v. *Chicago, R. I. P. Railway Company,* 297 F. 710, C. C. A. 1924 affirmed in part and reversed in part, 270 U. S. 378, 70 L. Ed. 641, 46 S. Ct. 236; *Driscoll* v. *Edison Light and Power Company,* 307 U. S. 104, 83 L. Ed. 1134, 59 S. Ct. 715; *Thompson* v. *Consolidated Gas Utilities Corpn.,* 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364.

As stated, the lower court did not pass on the issue of the constitutionality of the act called into question and neither party could complain on appeal as neither was prejudiced thereby. Ordinarily, the court will not pass on a question not presented on appeal by assignment of error. *Whittington* v. *H. T. Cottum Company,* 158 Miss. 847, 130 So. 745.

Despite the universal rule that a court will not decide a constitutional question until actually presented, *State* v. *Gilmer Grocery Company,* 156 Miss. 99, 125 So. 710; despite

the rule that a constitutional question will not be decided unless there is no escape therefrom, *Meek* v. *Humphreys County,* supra: despite the rule that a constitutional challenge will not be noticed when a cause is reversible on other grounds; *Maxey* v. *State, supra;* despite the holding in *Hoskins* v. *Howard, supra,* that the lower court erred in the "sole" findings upon which its judgment was based, the respondents ask this Court to foreclose the petitioners and deny them the right to exist because the Supreme Court of Mississippi *apparently* decided the question of constitutionality. The Supreme Court of Mississippi in its lengthy discussion on the validity of Chapter 458, Laws of 1950, was discussing a question not passed on by the court below, not presented on appeal and not necessary to the decision reached. It is submitted that in so doing, the court acted completely outside the several established modes of procedure as heretofore pointed out, and that the decision is advisory merely, and the petitioners should not be judicially estopped or bound by *res judicata.* When the court below found that the respondents had not organized their party as required by law, a condition precedent to registration under the act in question, the constitutional question raised only in the event the petitioners were wrong in their first count, became completely outside the issue. Proper procedure and rules of constitutional law demanded it be left alone in the lower court, and when another, decisive ground was found for reversal on appeal, the Supreme Court, too, was precluded from considering the act's constitutional aspect. In considering it, the Mississippi Supreme Court departed from the established modes of procedure governing the case and rendered or appeared to render a decision without proper attention having been given the question by the parties or the court, and a plea of *res judicata* thereon should not be sustained.

C. *Only Issues Developed Below May Be Considered On Appeal So As To Become Res Judicata Between The Parties*

Aside from the fact that the Three Judge Court which rendered the judgment vacated by this court did not sit as "simply another court" of the State of Mississippi, *Angel* v. *Bullington,* 330 U. S. 183, and aside from the fact that the relief sought in this case is essentially different from that in *Hoskins* v. *Howard,* it is submitted the doctrine of *res judicata* would not apply even in another suit in a state court for the reason that the decision of the constitutional question was not necessary nor in any way material to the judgment rendered. It was not argued or decided, nor was it necessary to the decision of the Supreme Court or properly before it. Its decision, therefore, cannot work an estoppel between these parties. Authority for this conclusion will be found in the following cases:

In *City of Biloxi* v. *Lowery,* 179 Miss. 364, 175 So. 200, the Supreme Court of Mississippi said:

> "It is averred in the answer to the cross-bill that the special improvements lien is void and has been from the beginning. No proof was made along this line, and that question was not developed before or considered by the Chancellor, and, we, of course, express no opinion on it . . ."

Again in *Alexander* v. *Woods,* 115 Miss. 164, 75 So. 772, a temporary injunction was dissolved with no damages for its issuance being awarded or considered although a written suggestion for damages had been filed. Suit was subsequently brought for damages and a peremptory instruction given the defendants on the ground that the question had been before the court and could have been litigated, and

was, therefore *res judicata*. On appeal the Supreme Court of Mississippi reversed, saying:

> "Two reasons are assigned in this court by the appellees as to why this was proper—the first being, that no damages were sustained by the issuing of the temporary injunction; second, that the dismissal of the case without awarding any damages was res judicata on the question of damages. The Chancellor did not pass upon the question of damages in that court; consequently it is not res judicata . . ."

It is true that courts have made general statements to the effect that those things which might have been litigated in a former suit as well as those things actually litigated are *res judicata* between the parties. As shown by the cases cited above, however, the rule is subject to exceptions, and, by "those things which might have been adjudicated" is meant those things necessarily involved in reaching a decision. *Mitchell* v. *State*, 179 Miss. 814, 176 So. 743; *Hardy* v. *O'Pry*, 102 Miss. 197, 214, 59 So. 73.

D. *Matters Immaterial To A Decision Are Not Res Judicata*

In other words, not every issue raised in a case, but only those actually or necessarily decided because material to the decision are *res judicata* between the parties. It is true, as heretofore stated, that at the former hearing between these parties in the state court, the petitioners pleaded in the alternative that Chapter 458, Laws of 1950 was unconstitutional in that it deprived them of their property without due process of law and for other reasons. It must be remembered, however, that the Circuit Court of Hinds County based its decision upon the "sole" ground that "they had changed their name from Independent Republican Party to Mississippi Republican Party . . . after the happening of the events required to be performed in

1948 . . ." After reaching that decision, the question of the constitutional validity of the act became immaterial and the order was entered by the Circuit Court without that court considering, much less determining, its validity.

In *Murphy* v. *McLaughlin*, 247 F. 385 (C. C. A., 5th Cir.), the court said:

> "The judgment of the court of appeals for the Parish of Orleans, which was affirmed by the Supreme Court, allowed the appellant interest. However, there was no contestation either in the Civil District Court or in the Court of Appeals, or in the Supreme Court, as to whether interest was properly allowable or not. It was not a controverted issue between the parties, before the rendition of judgment, and in no true sense can it be said to have actually litigated in the state court . . . If the allowance of interest was immaterial to the rights of the trustee in that case, it would seem that he was under no duty to appeal from the judgment in that respect . . .
>
> "Appellant's right to interest not having been actually a matter of contestation between the parties and not having been necessary to a decision to any of the issues involved in the state court litigation, we hold that the appellant's plea of res judicata failed . . . "

In *Millie Iron Mining Company* v. *McKinney*, 172 F. 42 (C. C. A., 6th Cir.), the court held:

> "Furthermore, there is another principle, before alluded to, which we regard as also applicable and controlling. *It is that matters immaterial or only incidental to the issues and judgment in one action, even though heard and passed upon, do not work estoppel in a subsequent action between the parties.*" (Emphasis added.)

The petitioners are in accord with the fundamental principle that litigation must come to rest, but respectfully urge

that their rights, so important to them and the hundreds they represent; rights going to the fundamental freedom of Americans to take a political stand and to make their political convictions effective, should not be cut off unless the controlling questions involved have, in fact, been litigated and finally and judicially settled. This, they contend, cannot be determined unless this court is able to consider the full record and not just the piece-meal portions the respondents have seen fit to put before it.

As this Court pointed out in *Russell v. Place*, 94 U. S. 606, 608, 609, 24 L. Ed. 214:

> "To render the judgment conclusive, it must appear *by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, that the verdict in the suit could not have been rendered without deciding that matter;* or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." (Emphasis added.)

When the Supreme Court of Mississippi in the prior litigation between these parties found that the respondents had properly organized their party, that disposed of the case. The constitutionality of the act became at once immaterial to the judgment rendered and was not put at issue between the parties, and when it cannot be said that the rights of the parties depended upon a decision of that question, its decision was a mere gratuitous act by the court and was advisory merely, particularly where, as here, the lower court did not pass on the question. As was said in *Johnston* v. *Johnston*, 122 Fla. 372, 165 St. 638:

> "As to the questions brought up not ruled upon by the Chancellor, our former opinion was not conclusive, and we must decline to rule on them now, as the presumption is that the Chancellor will settle them cor-

rectly, and, *if they arise in further proceedings in the cause, anything said of them . . .*" (Emphasis added.)

The Supreme Court of Mississippi has in many, many cases carefully pointed out that the doctrine of *res judicata* rests on the ground that the matter sought again to be litigated has, in fact, been adjudicated and that "where it appears that the particular matter was not the essence of the cause" and did not require or receive the attention due it the rule does not apply. *Lorance* v. *Platt*, 67 Miss. 183, 6 So. 772; *Lion Oil Refining Company* v. *Crystal Oil Company*, 171 Miss. 36, 156 So. 593. No judgment is conclusive of any matter not required to support it. And "if the language of the judgment is general", it will be restrained to the issues made in the case and to the subject matter under consideration by the court. "Even if the judgment purports to affirm a particular fact or rule of law, yet, if such a fact or rule of law was immaterial and collateral to the issues in the case, and the controversy did not turn upon it, the judgment will not conclude the parties in reference thereto." *Thompson* v. *Hill*, 152 Miss. 390, 119 So. 320; 2 Freeman on Judgments, page 1474.

Certainly if a question has been litigated so as to be *res judicata* as to one party to the action, it applies with equal finality as to all parties. In the prior litigation between these parties, the only question decided was that the respondents here had not properly organized the "Mississippi Republican Party" under that name. Suppose, if the court will, that the respondents here had subsequently tried to register under the name "Independent Republican Party" by which they were properly organized. Upon refusal by the Secretary of State, would they have been barred by *res judicata* from questioning the constitution-

ality of the statute? Obviously they would not, the question not having been decided by the Circuit Court. The unconstitutionality of the act was not properly raised on appeal. As stated, the plaintiffs in that suit were granted the relief prayed; they had no right to appeal. The defendants had denied the act to be unconstitutional; they could not raise the question. It is true, the plaintiffs in that suit, petitioners here, pointed out in their brief that they had pleaded the constitutionality of the act below, but no authority was cited and no attempt was made to make an issue of it.

That Chapter 458, Laws of 1950 was unconstitutional was never put on issue between the parties at the former hearing, was immaterial to a decision in the case, and it is submitted, the decision rendered thereon in *Hoskins* v. *Howard, supra,* would not form a basis for a plea of *res judicata* even in the state courts of Mississippi.

If the constitutional question was not decided so as to bar the issue in the state courts, how much less should it operate in the federal courts which sit in such matters, not as another state court as was the case in *Angel* v. *Bullington,* 330 U. S. 183, but as federal courts, with the primary duty of guarding the rights guaranteed by the constitution?

In the former litigation, the petitioners were not seeking registration as such, but were seeking to have the registration of appellants cancelled because they had not complied with the registration laws. That was a war of extermination. This is a struggle for survival. In that fight the appellees were asking the court to determine whether respondents had complied with the law. The present issue is whether the law destroys petitioners constitutionally guaranteed rights.

In *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069, this court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show . . . "

And in *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661, this court held:

> "The prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered' Cromwell vs. County of Sac, 94 U. S. 351, 24 L. Ed. 195."

In *Pueblo Savings & Trust Company* v. *Power*, 115 F. (2d) 69, (C.C.A. 7th Cir.) the court said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive upon that question in another suit between the same parties. But to this operation of the judgment, it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there is any uncertainty in the former ruling as to what the court really decided, the whole subject matter of the action will be at large and open to a new contention. DeSollar vs. Hanscome, 158 U. S. 216, 221, 15 S. Ct. 816, 39 L. Ed. 956 . . ."

Petitioners do not contend that the federal courts should not give full faith and credit to a decision rendered by the Supreme Court of Mississippi upon issues properly presented to it and actually decided. They do urge that such force should be given the state court's decision only if the question was properly before it and actually and not just

apparently resolved. In this case in the former litigation, the only point decided was that respondents could change their name by resolution.

In *Aylesworth* v. *Gartiot County*, 43 F. 350, affirmed, 159 U. S. 250, the court said:

> "While we would desire to give full force to the opinion of the Supreme Court in this case, the point really decided was that the relator had not made title to these orders. There was no such construction given to the Drane law as will be binding upon this court, nor are there any reasons given in this opinion why a holder of these orders might not maintain suit upon them. . . . We do not understand the court to decide that an action could not be maintained against the county upon these orders, but only in its discretion it would refuse a writ of mandamus . . ."

As was said in *Mayor and Aldermen of the City of Vicksburg* v. *W. A. Hanson*, 231 U.S. 259, 58 L. Ed. 209:

> "The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties . . ."

And in the same case this court said:

> "We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided, and the rights of the contending parties thereby concluded . . ."

The petitioners do not come before this court with a private lawsuit. They stand in the shoes of and seek to protect the rights of thousands of members of a great and organized political party condemned to die, not because of any wrong it has done, but simply because, though first in time in the use of its name, it was last in time in the "footrace" to the State Capitol. The interests sought to be protected

are public interests. Certainly this is not a case for the rigid application of legal principles to deny protection to those rights.

As was said in *Virginian Railroad Company* v. *System Federation No. 40*, 300 U.S. 515, 552, 57 S. Ct. 592, 601, 81 L. Ed. 789:

> "Courts of equity may and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Finally Appellees submit that the doctrine of *res judicata* is not to be rigidly applied so as to deny justice and equity between litigants, but, as was said in *Holmes* v. *Donald*, 84 F. (2d) 188 (C.C.A., 5th Cir.), by Judge Hutcheson, speaking for the Court:

> "Res judicata is a principle of peace, it operates to prevent the retrial of issues, facts, and actions once tried and determined on their merit. It is not a procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently, determined . . ."

Petitioners respectfully urge that the situation here is very amply described in Judge Hutcheson's words quoted above. The constitutionality of Chapter 458, Laws of 1950, was not considered by the Circuit Court of Hinds County and was not before the Supreme Court of Mississippi on appeal in *Hoskins* v. *Howard, supra.* That court construed the act, and as construed it violates fundamental rights of the petitioners and those on whose behalf suit was brought.

From the decision of the Supreme Court of Mississippi rendered in *Hoskins* v. *Howard*, 214 Miss. 481, 59 So. (2d) 263, counsel then representing petitioners undertook to pro-

ceed to this court by way of certiorari. As the record will reveal, because of illness of petitioner's counsel, certiorari was denied, 344 U.S. 915, 73 S. Ct. 334, 97 L. Ed. 705. Perhaps the petitioners were then brought within the purview of the doctrine of *res judicata* in its technical sense. When, however, consideration is given the rules which requires actual litigation of an issue before the doctrine becomes applicable; when, as here, the issues were not, in fact, litigated, and when the fundamental rights of a vast number of citizens are at stake, it is submitted the policy of ending litigation is outweighed by the urgency of showing the truth.

Conclusion

Petitioners believe that upon a full hearing on the merits of this cause, this Court will reinsate and affirm the judgment of the District Court for the reasons set forth in the foregoing petition, and, therefore, respectfully urge that a rehearing be granted.

Respectfully submitted,

—— ——,
Of Counsel for Petitioners.

Certificate

I, Perry W. Howard, Sr., of counsel for petitioners, hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for purposes of delay.

PERRY W. HOWARD, SR.,
Of Counsel for Petitioners.

Certificate of Service

I, the undersigned Perry W. Howard, Sr., one of the attorneys of record for petitioners, hereby certify that I have this day served the above and foregoing petition for rehearing on the respondents by mailing a true and correct copy thereof by the United States mail, postage prepaid, to Lester E. Wills, attorney of record for respondents, at his last known mailing address at Box 566, Meridian, Mississippi.

PERRY W. HOWARD, SR.,
Of Counsel for Petitioners.

YOUNG and DANIEL,
Counsel for Petitioners (Appellees).

No. 501. WHITE ET AL. *v.* HOWARD ET AL. Appeal from the United States District Court for the Southern District of Mississippi. *Per Curiam:* The judgment is vacated and the cause is remanded to the District Court with instructions to dismiss the complaint. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS dissent. They would postpone the question of jurisdiction to the merits. THE CHIEF JUSTICE took no part in the consideration or disposition of this case. *Lester E. Wills* for appellants. *Perry W. Howard, Sr.* for appellees. Reported below: 116 F. Supp. 783.